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No.

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS GOUGHNOUR, *Petitioner,*

v.

FERNANDO BELMONTES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In *Boyde v. California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the so-called "unadorned factor (k)," which directs juries to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This Court found jurors would reasonably understand this instruction to encompass mitigating factors unrelated to the crime itself, such as the defendant's background and character.

In this case, the Ninth Circuit Court of Appeals held that use of this same instruction violated the Eighth Amendment of the United States Constitution because it likely misled the jurors to believe they were forbidden from considering background and character evidence relating to "forward-looking" considerations about the defendant's future prospects if sentenced to life in prison.

The questions presented are:

1. Does *Boyde* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2. Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989)?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

THOMAS GOUGHNOUR, *Petitioner,*

v.

FERNANDO BELMONTES, *Respondent.*

Thomas Goughnour, Acting Warden,[1] California State Prison at San Quentin [hereinafter petitioner], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit Court of Appeals (App. 1a-83a) is reported at *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003). The Ninth Circuit order denying rehearing and rehearing en banc (App. 84a-99a) is reported at *Belmontes v. Woodford*, 359 F.3d 1079 (9th Cir. 2004). The order of the District Court is unreported. App. 100a-145a.

The opinion of the Supreme Court of California on direct appeal (App. 146a-227a) is reported at *People v. Belmontes*, 45 Cal.3d 744, 755 P.2d 310, 248 Cal. Rptr. 2d 126 (1988), *cert. denied*, 488 U.S. 1034 (1989).

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1. Thomas Goughnour has recently replaced Jeanne Woodford as acting warden of San Quentin State Prison.

STATEMENT OF JURISDICTION

A majority panel of the Ninth Circuit entered judgment granting habeas corpus relief on November 20, 2003. The Ninth Circuit denied petitioner's motion for rehearing and suggestion for en banc rehearing in an order issued February 5, 2004. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

California Penal Code section 190.3 provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

STATEMENT OF THE CASE

On March 15, 1981, respondent Fernando Belmontes armed himself with a metal dumbbell bar and went to burglarize the home of 21-year-old Steacy McConnell in Victor, California; Steacy was home when Belmontes arrived. After entering the house and discovering Steacy, Belmontes savagely

beat and killed her with the metal bar, severely fracturing her skull with about 20 blows and causing approximately 15 gaping wounds to the left forehead and behind her left ear. In an apparent attempt to ward off the brutal attack, Steacy also suffered defensive wounds to her arms, legs, and feet. After delivering these fatal blows, Belmontes stole Steacy's stereo equipment.

Moments later, Belmontes explained to his two accomplices (who had been waiting outside in a getaway car) that he had hit Steacy about 15 times because she was home, and he had to take her out as a witness. Later that afternoon, Belmontes sold Steacy's stereo for $100, split the money with his accomplices to the crime, and used some of it to buy beer.

State Court Proceedings

Following a trial in the San Joaquin County Superior Court, a jury found Belmontes guilty of special-circumstance, first-degree murder.

At the penalty-phase trial, the prosecutor introduced evidence in aggravation of the following prior instances of Belmontes' violent or criminal conduct: (1) Belmontes' theft of a handgun in early 1979; (2) Belmontes' carrying the gun for protection during the same time period; (3) Belmontes' April 1979 conviction as an accessory to voluntary manslaughter; (4) a domestic aggravated assault and battery Belmontes committed on his pregnant girlfriend the month preceding Steacy's murder; and (5) an assault Belmontes committed earlier while he was a ward in a county youth facility. The prosecution also presented aggravating evidence of autopsy photographs depicting the nature and extent of Steacy's fatal injuries.

In mitigation, Belmontes' defense presented evidence of: (1) Belmontes' impoverished, unstable, and abusive upbringing; (2) Belmontes' caring and wholesome relationships with a number of decent friends and family members, and (3)

Belmontes' good performance during a prior commitment to the California Youth Authority (CYA). This latter category of evidence related in part to Belmontes' participation in a church-related "M-2" sponsorship program provided at CYA. This evidence was offered to show (1) more good relationships with decent people, (2) that Belmontes had made a legitimate religious conversion, and (3) that Belmontes was, therefore, a "salvagable" person who would be able to assist other inmates if committed to prison for life.

Following this evidence, the trial court instructed the jury pursuant to California's then-existing "catch-all" mitigation evidence instruction ("unadorned factor (k)"). That instruction echoed the language of California Penal Code section 190.3(k), and advised the jurors:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Cal. Jury Instructions, Criminal ("CALJIC"), No. 8.84.1 (4th ed. 1979).

The trial court also gave the jury the following "special instruction":

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may

support a decision that death is not the appropriate punishment in this case.

Both parties acknowledged that the jury could, and should, consider Belmontes' future prospects. Belmontes himself testified and asked the jury for life in prison because, in prison, "there is an opportunity to achieve goals and try to better yourself." He asked the jury to spare his life so he could "try to improve" himself. In closing statement, defense counsel argued that, in light of the evidence of Belmontes' prior CYA commitment, although he could not "make it on the outside," he could "fit[ ] into the system" and "contribute something" in the future. Even the prosecutor acknowledged that the jury could and should consider Belmontes' future prospects of a life in prison in determining the proper punishment: "And I think that value to the community [in the future] is something that you have to weigh in. There's something to that."

During jury deliberations, the trial court conducted a brief, informal exchange with the jurors in response to some of their questions:

> Juror Hern: The statement about the aggravation and mitagation (sic) of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process.

A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The court responded, "That is something you cannot consider in making your decision."

The jurors went back to their deliberations and ultimately returned a verdict of death.

On appeal to the California Supreme Court, Belmontes argued that the "unadorned factor (k)" instruction failed to inform the jury of the proper role of sympathy and general character and background evidence. Belmontes also asserted that Juror Hern's inquiry about the "listing" and "balancing" of mitigating factors reflected an unconstitutionally restrictive understanding of the proper scope of mitigating evidence, which the trial court improperly failed to clarify.

The California Supreme Court rejected these claims, finding the instructions and arguments, taken as a whole, fully and properly defined the scope and nature of the jury's sentencing responsibilities. App. 201a-205a.

Belmontes' petition for certiorari was denied. *Belmontes v. California*, 488 U.S. 1034 (1989).

Federal Proceedings

On November 4, 1994, Belmontes filed an amended petition for writ of habeas corpus in the United States District Court for the Eastern District of California. The amended petition alleged that the trial court's answers to Juror Hern's mid-deliberation questions about the "listing" and "balancing" of mitigating factors led the jurors to misunderstand the proper scope of their sentencing determination, despite the other instructions previously given.[2/]

The district court rejected this claim because the overall

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2. After Belmontes' judgment became final, this Court in *Boyde v. California*, 494 U.S. 370 (1990), addressed the constitutional sufficiency of the "unadorned factor (k)" instruction. As was true on direct state appeal, Belmontes raised no claim in federal habeas about the constitutional insufficiency of the factor (k) instruction for purposes of informing the jurors of their authority to consider the bearing of character evidence on his future prospects as a life prisoner.

instructions were sufficient to dispel any possible confusion and that neither the juror's inquiry, nor the court's comments, suggested a "misunderstanding or repudiation of these instructions." Citing *Boyde*, the district court concurred with the California Supreme Court: "the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities." App. 139a-140a.

On appeal to the Ninth Circuit Court of Appeals, Belmontes again claimed that the trial court's responses to Juror Hern's questions misled the jurors about the proper scope of their sentencing responsibilities. A majority of a three-judge panel reversed Belmontes' penalty judgment. The panel opinion, authored by Judge Reinhardt and joined by Judge Paez, found prejudicial error under the Eighth Amendment based on the instructions regarding the various circumstances the jurors may consider in determining whether Belmontes should receive a sentence of death or life in prison.

Though acknowledging that this Court in *Boyde* had approved the "unadorned factor (k)" instruction, the majority limited *Boyde*'s holding to cases in which the evidence in mitigation is limited to general information about the defendant's "background and character" offered to "tend to explain why the defendant committed the crime." App. 58a. The instruction was constitutionally insufficient in this case because, according to the panel majority, it failed to inform the jurors they could consider the proffered evidence of Belmontes' former commitment to CYA in determining whether he might adjust well to a life in prison. App. 58a, 60a.

The majority concluded that this asserted facial inadequacy of the "unadorned factor (k)" instruction, coupled with the trial judge's informal answers to Juror Hern's and Juror Hailstone's questions during deliberations, was reasonably likely to have misled the jurors to believe they were forbidden from considering Belmontes' evidence offered to show he "would live a productive life if permanently incarcerated in a structured environment." App. 65a.

Judge O'Scannlain dissented, concluding that the majority's reasoning rested on a threefold misapplication of *Boyde*. First, *Boyde's* holding made it "perfectly clear" that all of Belmontes' proffered evidence in mitigation was squarely within the ambit of the "unadorned factor (k)" instruction.[3/] Second, given the overall evidence and the uncontested arguments on both sides in this case, any chance of the jury not appreciating the permissible scope of Belmontes' proffered evidence was "pure fantasy." App. 76a. And third, in light of the overall instructions, there could be no reasonable likelihood, as required under *Boyde*, that the jury applied the "unadorned factor (k)"instruction in such a way as to foreclose consideration of any constitutionally relevant evidence. Quoting *Boyde*, Judge O'Scannlain found that any such conclusion would turn the entire proceeding "into a virtual charade." App. 82a (quoting *Boyde*, at 383).

Eight judges dissented from the order denying en banc rehearing, two of them issuing published opinions. Judge Callahan reiterated the concerns expressed by Judge O'Scannlain and added that the majority's reasoning amounted to a belated and unsupportable affront to the California Supreme Court's well-considered conclusion in this case. App. 85a-95a. Judge Bea joined Judge Callahan's opinion and added two additional criticisms: First, Judge Bea objected to the panel majority's suggestion that the jurors should have been instructed to consider "mitigating" evidence bearing on Belmontes' probable future conduct (App. 16a, 59a, 64a) reasoning that any such instruction that characterized specific evidence as "mitigating" would constitute an improper, argumentative

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3. Judge O'Scannlain also identified other decisions of this Court that would dictate that the jury here was given more than constitutionally adequate guidance in assessing all such evidence. See *Buchanan v. Angelone*, 522 U.S. 269 (1998); *Johnson v. Texas*, 509 U.S. 350 (1993); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); cf. *Tuilaepa v. California*, 512 U.S. 967 (1994). App. 73a-81a.

comment on the evidence by the trial court. App. 96a-97a. Second, Judge Bea concluded that the majority panel, in finding the "unadorned factor (k)" instruction to be insufficient, had misquoted and mischaracterized the instruction's language. Specifically, Judge Bea noted that the majority had improperly interpreted the instruction's phrase "extenuates the gravity of the crime" to mean "extenuates [Belmontes'] culpability for the crime." App. 58a. Judge Bea reasoned that factors which might "extenuate the gravity of a crime" can encompass "the extent that the criminal shows remorse, repents, or rehabilitates himself." App. 97a-99a.

REASONS FOR GRANTING THE WRIT

In reversing the capital judgment imposed on Belmontes, the Ninth Circuit stands in defiance of this Court. In *Boyde*, this Court held that California's "catch-all" mitigation instruction in capital cases, unadorned factor (k), "directed" the jury "to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." *Id.* at 382. In this case, the Ninth Circuit held that the factor (k) instruction *does not* adequately inform a jury that it may consider a defendant's background and character.

This holding distorts the letter and spirit of *Boyde*. Indeed, *Boyde* so obviously controls this case that respondent did not even assert to the Ninth Circuit that the factor (k) instruction prevented the jurors from considering all of his proffered mitigating evidence. The Ninth Circuit's holding that there was a reasonable likelihood jurors were misled not to consider mitigating evidence ignores *Boyde*'s reliance on jurors to use their commonsense in applying court instructions.

In ruling for respondent on that ground, the Ninth Circuit created a new rule of federal constitutional law. Under the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), however, new rules are inapplicable on federal habeas review.

The Ninth Circuit's disregard of the *Teague* doctrine provides still another reason why certiorari is warranted.

ARGUMENT

I.

THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE*

A. California's "Unadorned Factor (k)" Instruction Does Not Preclude Consideration Of "Forward-Looking" Evidence Offered In Mitigation

In *Boyde*, this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the same instruction given in the trial below. Boyde argued "that the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to non-crime related mitigating evidence, because its language ... limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (original emphasis). This Court rejected Boyde's contention, concluding that California's "catch-all" mitigation instruction was constitutional on its face because it permitted consideration of non-crime-related evidence in mitigation. *Id.* at 380-82. Considering the instruction "standing alone," this Court held that there was no reasonable likelihood "that the jury applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380-81. As was true in the trial here, the jury in *Boyde* had been "directed to consider *any other circumstance* that might excuse the crime, which certainly includes consideration of a defendant's background and character." *Id.* at 382 (original emphasis).

The Ninth Circuit's attempt to distinguish *Boyde* rests on

a false premise, *viz.*, that *Boyde* is facially limited to cases simply involving evidence of a defendant's "background and character" that is offered solely to "tend to explain why the defendant committed the crime." App. 58a. To the contrary, this Court in *Boyde* acknowledged that when the "factor (k)" instruction is considered in light of the other instructions given (which were also all given in this case), reasonable jurors would in fact realize they were to consider all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383.

Moreover, there is nothing in *Boyde* to suggest, as the majority panel here concludes, that *Boyde's* holding would not apply with equal force to the mitigation evidence offered in this case. As Judge O'Scannlain found in dissent, the evidence supporting Belmontes' argument of future institutional adjustment consisted solely of testimonials regarding his background and character during his CYA commitment, and "*Boyde* makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k)." App. 72a.

Indeed, this Court's holding in *Skipper v. South Carolina*, 476 U.S. 1 (1986)–upon which the majority panel also relies–acknowledges that evidence of a defendant's prior incarceration, offered to show a likely future of conformity in prison, is in fact a form of character evidence: "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character...." *Id.*, at 7.

The panel majority reasoned that *Boyde* is inapplicable in this case because Belmontes' evidence was not offered merely "to explain why the defendant committed the crime." App. 58a. According to the majority, the language of the catch-all instruction does not encompass "those forward-looking considerations" such as "evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment." App. 58a.

This conclusion is inconsistent with this Court's previous

holdings and, in any event, is logically untenable. As the Court noted in *Boyde*, jurors would naturally consider such background and character evidence as extenuating the gravity of the crime "even though it is not a legal excuse for the crime . . . ." *Boyde*, at. 382 n. 5.

Background and character evidence, offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, even if unrelated to the defendant's culpability for his offenses, would nonetheless be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Indeed, such a "forward-looking inquiry *is not independent of an assessment of moral culpability*." *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (emphasis added).

In its effort to distinguish *Boyde*, the panel below declared that society has no "long held view" about the mitigating effect of a defendant's likely future conduct. Cf., *Boyde* at 382 (recognizing "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.") Therefore, reasoned the panel, "in the absence of a clear instruction on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor." App. 59a.

The panel's pronouncement is at odds with common sense, inconsistent with this Court's previous views on the matter, and irrational in light of the record. Indeed, this Court in *Skipper* expressly found that consideration of a defendant's prior good behavior in prison, offered as indicative of his character for probable future conduct if sentenced to life in prison, "is an *inevitable* ... element of criminal sentencing that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 5 (emphasis added).

In this case, as aptly summarized in Judge O'Scannlain's

dissent, the jury heard, without objection, several witnesses testify about Belmontes' prior experience in CYA. Belmontes himself asked the jury for life in prison based on his future prospects and goals. Both Belmontes' counsel and the prosecution effectively and unambiguously argued that, in light of the evidence of Belmontes' background, the jury could and should consider his future prospects of a life in prison in determining the proper punishment. Neither the trial court nor any of the parties or witnesses said anything to counter the very clear message that the jury could, and should, consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects.

As was true in *Boyde*, reasonable jurors here would not have believed the court's instructions somehow "transformed all of this 'favorable testimony [and unrebutted argument] into a virtual charade.'" App. 82a (O'Scannlain, J., dissenting); *Boyde*, at 383-84 (quoting *California v. Brown*, 479 U.S. 538, 542 (1987).)

B. The Ninth Circuit's Interpretation Of *Boyde* Threatens To Affect The Validity Of Numerous Other Capital Cases In California And In Other States

The implications of the Ninth Circuit's decision extend beyond the penalty-phase judgment in this case. The decision could jeopardize the validity of numerous death penalty judgments in California. Indeed, in light of the additional "special instruction" given in the trial below (which informed the jurors that mitigating factors were not limited and that any one such factor could suffice in finding a death judgment inappropriate), the majority's decision potentially implicates capital judgments beyond those involving only California's "unadorned (k)."

The "unadorned factor (k)" instruction or an augmented

version thereof (such as the additional "special instruction" here), was given in virtually every California capital case from 1978 to at least 1983. *See People v. Easley*, 34 Cal.3d 858, 196 Cal.Rptr. 309, 671 P.2d 813 (1983). The *Belmontes* reasoning would potentially encompass any such pending case so long as: (1) there was any evidence of satisfactory performance during prior penal or juvenile commitments, (2) there was any evidence or argument about the defendant's future prospects, goals, etc., or (3) there was anything presented about the defendant's character or history which might suggest a confirming or worthwhile future life in prison. With only preliminary research, petitioner has identified some 15 pending cases that, like this case, involving the "unadorned factor (k)" instruction, are not governed by the AEDPA and involve defense evidence of good future prospects in prison. Petitioner has also identified several post-AEDPA cases involving the "unadorned factor (k)" instruction, where the defendant presented this same type of evidence.

One such pending case is particularly noteworthy. In *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) (en banc), the Ninth Circuit reversed a capital judgment because the "unadorned factor (k)" instruction assertedly misled the jury to believe they could not consider evidence of "good conduct" after the defendant's arrest for the charged offenses. *Id.* at 822-825. Such "error" was compounded, in the circuit court's view, because the prosecutor insisted in closing argument "that the statutory list of factors precluded them from considering the *only* mitigating evidence Payton presented -- evidence of a post-crime religious conversion and its positive effects on other inmates and the administration of the jail." *Id.* at 825 (original emphasis).

Last term, this Court granted certiorari and remanded *Payton* with instructions to reevaluate the matter under the AEDPA. *See Woodford v. Payton*, __ U.S. __, 123 S.Ct. 1785 (2003). On remand, the Ninth Circuit again found that, even under the strictures of the AEDPA, the "unadorned factor (k)"

instruction was insufficient in light of controlling Supreme Court precedent. The court concluded that *Boyde* was not controlling precedent under the AEDPA because *Boyde* did not expressly address the applicability of the "unadorned factor (k)" instruction to post-crime evidence. *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003). Petitioner has filed a second petition for writ of certiorari in *Payton*, which is pending before this Court in case number 03-1039.

In light of this case and *Payton*, it is apparent that the Ninth Circuit has adopted an unsupportably narrow interpretation of *Boyde* that threatens the validity of capital judgments notwithstanding the limitations of the AEDPA. This Court's intervention and guidance is, therefore, warranted and urgently needed.

C. The Majority Panel's Decision In This Case Illustrates The Ninth Circuit's Fundamental Misunderstanding Of The Controlling Standard For Assessing Constitutional Instructional Error Enunciated In *Boyde*

The Circuit's holding that the "unadorned factor (k)" instruction does not include "forward looking" evidence constitutes an "end run" around *Boyde's* holding that that instruction would be reasonably understood by jurors to include background and character evidence unrelated to the crime itself. The extent of this "end run" is illustrated by the panel majority's analysis of whether there was a "reasonable likelihood that the jury" applied the instruction to prevent "consideration of constitutionally relevant evidence."

In addition to the "unadorned factor (k)" instruction, the jury was also instructed:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some

> of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

To buttress its holding as to the insufficiency of the "unadorned factor (k)" instruction, the panel majority speculated that the second and third sentences of this instruction undermined and contradicted the first sentence. However, as the dissents point out, it was not reasonably likely that the jury would have interpreted this instruction as preventing it from considering any factor, whether enumerated or not–including "forward-looking" evidence.

The panel majority also found that the trial judge's answers to the jury's questions "compounded" the problems with the instruction. However, nothing in those exchanges contradicted either the reading of the "factor (k)" instruction confirmed in *Boyde* or the trial court's instruction that the jury should consider all mitigation, rather specifically enumerated or not enumerated in the instructions. Since the trial court also instructed the jury to "go over the instructions again with one another," it is complete conjecture that the jury concluded it was precluded from considering Belmontes' "forward-looking" evidence.

The panel majority's analysis reverts to an "inquiry" that depends on how a single hypothetical juror "could" or "might" have interpreted an instruction. It gives no credit to the ability of jurors to intelligently "thrash" out instructions during their deliberations, "with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Boyde*, at 380-381. It cannot be assumed that the jurors believed that Belmontes' mitigation case was a "virtual charade." *Id.* at 383.

The Ninth Circuit's holding is an unsettling regression

from the "reasonable likelihood" standard. It undercuts the straightforward interpretation of the "unadorned factor (k)" instruction confirmed in *Boyde* by using a test of mere possibilities. The continued application of this type of impermissible analysis to other cases will result in unnecessary "retrials years after the first trial where the claimed error amounts to no more than speculation."

II.

THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE V. LANE*, 489 U.S. 288 (1989)[4]

Under *Teague*, a defendant may not receive federal habeas relief based on a new rule of federal constitutional law not "dictated by precedent existing when the judgment in question became final." *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288. Even when the asserted basis of a constitutional violation does not rest on a "new rule," habeas relief is still precluded where the prior precedent upon which it relies is applied in a "novel setting." *Stringer*, at 228; *Butler*, at 414-15. "The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if

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4. Petitioner did not invoke *Teague* in its brief to the Ninth Circuit, and the majority panel's opinion contains no *Teague* analysis. This is because Belmontes' claim in the district court and on Ninth Circuit appeal concerned solely the propriety of the trial judge's responses to Juror Hern's questions. Indeed, the majority panel acknowledged Belmontes had not challenged the sufficiency of the "unadorned factor (k)" instruction: "Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hern, the Court has held that we must examine claims of instructional error in light of the record as a whole." Accordingly, Petitioner had no opportunity or reason to address the current *Teague* issue until after the majority panel issued its decision. Petitioner did invoke *Teague* in his petition for rehearing.

reasonable jurists may disagree." *Graham v. Collins*, 506 U.S. 461, 476 (1993) (quoting *Stringer*, at 238, Souter, J., dissenting).

Belmontes' judgment became final when this Court denied certiorari of his direct appeal on January 17, 1989. *Belmontes v. California*, 488 U.S. 1034 (1989). Prior to that time, there was no basis for reasonable jurists to disagree about the claim at issue because no controlling precedent had ever questioned the federal constitutional sufficiency of California's "unadorned factor (k)" instruction.

Boyde, of course, was issued after Belmontes' judgment became final, and *Boyde* confirmed the constitutional sufficiency of the "unadorned factor (k)" instruction. Accordingly, no rule of this Court extant at the time respondent's judgment became final could support the Ninth Circuit's conclusion that California's instruction was constitutionally insufficient.

To be sure, the panel majority relies on *Skipper v. South Carolina*, 476 U.S. 1 (1986). But *Skipper* is inapposite: This case involves no improper exclusion of mitigating evidence. Instead, the present matter merely involves an allegedly ambiguous jury instruction. The panel majority applied *Skipper* to the analysis here, in an unpredictably "novel" manner, to avoid the necessary result of *Boyde*. Such a methodology is barred by *Teague*.

CONCLUSION

The petition for certiorari should be granted.

Dated: April 21, 2004

Respectfully submitted,

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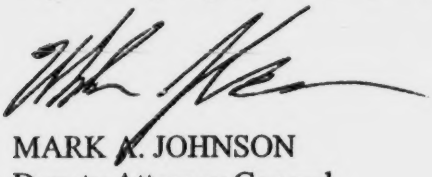

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fernando BELMONTES, Jr., Petitioner-Appellant,	)	No. 01-99018
	)	D.C. No.
v.	)	CV-89-00736-DFL
	)	ORDER AND
Jeanne S. WOODFORD, Warden, for the California State Prison at San Quentin, Respondent-Appellee.	)	AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
December 5, 2002–Pasadena, California

Filed July 15, 2003
Amended November 20, 2003

Before: Stephen Reinhardt, Diarmuid F. O'Scannlain and Richard A. Paez, Circuit Judges.

Opinion by Judge Reinhardt;
Partial Concurrence and Partial Dissent
by Judge O'Scannlain

COUNSEL

Eric S. Multhaup, Mill Valley, California; Christopher H. Wing,

Sacramento, California, for the petitioner-appellant.

Mark A. Johnson, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

ORDER

The opinion and dissent filed on July 15, 2003 is hereby amended. The clerk shall file the amended opinion and dissent.

OPINION

REINHARDT, Circuit Judge.

In this pre-AEDPA death penalty case, Petitioner Fernando Belmontes, Jr., appeals the district court's denial of his petition for writ of habeas corpus. Because the jury was not instructed that it must consider Belmontes' principal mitigation evidence, which tended to show that he would adapt well to prison and would likely become a constructive member of society if incarcerated for life without possibility of parole, and because there is a reasonable probability that the instructional error affected the jury's decision to impose the death penalty on Belmontes, we grant the petition with respect to the penalty phase. We reject, however, those claims that seek relief from the judgment of conviction and the finding of special circumstances. Accordingly, we affirm the district court's decision in part, reverse in part, and remand with instructions to issue a writ vacating the death sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Crime, Its Investigation, and Pretrial Proceedings

On the morning of Sunday, March 15, 1981, 19-year-old Steacy

McConnell telephoned her parents and stated that she was afraid because several people, including codefendant Domingo Vasquez, had threatened her. Several hours later, McConnell's parents arrived at her residence in Victor, California, and found her lying unconscious in a pool of blood. She died shortly thereafter from cerebral hemorrhaging caused by fifteen to twenty blows to her head with an iron bar. Her skull was cracked, and she had defensive injuries on her hands, arms, and feet. The house was ransacked and her stereo was missing.

On the Tuesday preceding the murder, several people, including Vasquez and another codefendant, Robert "Bobby" Bolanos, partied at McConnell's house. Although Bolanos left the residence early Wednesday morning, the party continued until Friday, when Vasquez stole a quantity of "black beauties"--amphetamine pills--from McConnell. Upon discovering the theft, McConnell threw Vasquez and his friends out of the house. The group subsequently discussed their dislike of McConnell.

Police investigation of the individuals who had been present at the party extended to Vasquez, and ultimately to Bolanos, who drove a distinctive black Chevy. The police recognized Bolanos' car as matching the description of the car that had been seen in McConnell's driveway at the time of the murder. The police impounded the car and interrogated Bolanos. Bolanos eventually admitted that he had been involved in the events that led to McConnell's death; he identified Vasquez and Petitioner Fernando Belmontes, Jr., who had not been at the party but who had been visiting him over the weekend of the murder, as his coadventurers. On the strength of Bolanos' statement, the police obtained a warrant and headed South to Ontario, where they arrested Belmontes at his brother's home. Belmontes was nineteen at the time.

Belmontes, Bolanos, and Vasquez were each charged with first degree murder and special circumstances. However, Bolanos soon arranged a deal with the prosecution in which he agreed to

testify against Vasquez and Belmontes in exchange for a guilty plea to second degree burglary and immunity on the murder charge. At Vasquez's preliminary hearing, Bolanos fingered Belmontes as the main assailant. After the preliminary hearing, the trial judge dismissed the special circumstances charge against Vasquez, and he pled guilty to second degree murder. That left Belmontes, who alone proceeded to trial.

B. The Guilt Phase

Bolanos was the principal witness for the state. He testified that on the morning of Sunday, March 15, he and Belmontes drove to Vasquez's residence to hang out. When they arrived, Vasquez was on the phone with McConnell. When Vasquez hung up the phone, he informed them that McConnell would not be home during the latter part of the day. The three were short of cash, and they agreed to burglarize McConnell's residence, steal her stereo, and "clean house." Vasquez's wife, Karrie Lynn, testified that as the men departed through the kitchen, Belmontes grabbed from the counter an iron dumbbell bar, which she used for rolling tortillas.

Bolanos told the jury that the three men drove to McConnell's house in Bolanos' vintage, black car and parked a short distance from the house. According to Bolanos, Belmontes stated that he would approach the house alone, on foot, carrying the metal bar in case he needed to force entry, so that he could gather McConnell's valuables and place them near the door to facilitate a quick getaway, and that the other two should wait for about five minutes and then bring the car around to McConnell's house.

Bolanos testified that the events unfolded as follows: Belmontes left his wristwatch with him, concealed the bar under his jacket, and walked to McConell's residence. Bolanos and Vasquez waited about five minutes, then drove up and backed into McConnell's driveway. Vasquez tried to open the trunk but could not find the right key. Bolanos got out of the vehicle to

assist Vasquez. He heard repeated knocking or banging noises coming from within the house. Bolanos unlocked the trunk and got back inside the car, while Vasquez walked to the front door to assist Belmontes. Shortly thereafter, Belmontes and Vasquez emerged from the back door of the house carrying stereo components. Belmontes was sprinkled with blood on his face, pants, and shoes. Vasquez "looked like he had seen a ghost." Belmontes stated that he had had to "take out a witness" because she was home. He explained that when McConnell heard Vasquez and Bolanos drive up, she looked away from him and he seized the opportunity to hit her with the bar approximately fifteen times.

Lucy Flores, McConnell's neighbor, testified that on the morning of the murder she watched Bolanos' Chevy as it backed into McConnell's driveway. She observed a man get out of the passenger side and try to unlock the trunk. He appeared to be having difficulty, whereupon the driver got out of the car and unlocked it. The driver got back in the car, while the passenger walked towards the front of McConnell's house and met a third man. She did not see where the third man had come from. The two men headed toward the front of McConnell's house. A short while later, she saw them exit McConnell's house from the back door, carrying stereo equipment, which they loaded in the trunk before getting in the car and driving away.

Bolanos testified that, after leaving McConnell's house, the three drove to the nearby city of Galt, where they intended to fence the stereo. En route, Belmontes wiped blood from the metal bar and his shoes. Belmontes threw the bar out of the window as they crossed a bridge over the Mokelumne river.[1] They went to the home of Manuel Vasquez, Domingo's brother, where Belmontes changed his pants. The three contacted Raul Barron, who met them at the home of Irma Vasquez, Domingo's sister, and purchased McConnell's stereo components from

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1. Bolanos later led police to the location on the river bank from which the bar was recovered.

them. Barron later testified that he paid $100 for the stereo to a man wearing a baseball cap (Belmontes), who did most of the talking.

Teresa Cobarrubio, Bolanos' girlfriend, testified that Bolanos gave her fifteen dollars from the proceeds of the sale of the stereo. Acting scared, he informed her that he, Belmontes, and Vasquez had burglarized McConnell's residence. The following day, Bolanos and Cobarrubio read a newspaper account of McConnell's murder, and Bolanos related further details of the crime. He told Cobarrubio that he had remained in the car, and that Belmontes had exited the house with blood on his clothes and had stated that he "had to take a witness out."

Bolanos testified that on Monday, March 16, Vasquez called him to advise that he had been questioned by police and did not want to "take the rap" for the murder. Bolanos and Belmontes went to Vasquez's house, where the three conferred. Karrie Lynn Vasquez testified that from the kitchen she overheard Belmontes say that he entered McConnell's house alone and hit her multiple times with the bar before Vasquez joined him in the house.

Barbara Murillo, Belmontes' girlfriend, testified that after the meeting, Belmontes telephoned her and told her that he was "in trouble." He reported that he had gotten into an argument with McConnell at her house, become angry and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep."

Detective Holman, the lead investigator, testified that Belmontes furnished three tape-recorded statements shortly after his arrest. In the first statement, he denied any involvement in the crime. In the second, he admitted the burglary but denied hitting McConnell. In the third statement, he admitted hitting McConnell, but insisted that he only hit her once, and then only at Vasquez's direction. He stated that the single blow he delivered caused McConnell to fall down, whereupon he

dropped the bar and began searching the house for valuables, leaving Vasquez alone with McConnell. Belmontes contended that he did not pay attention to Vasquez's actions during this period and did not observe how McConnell came to have suffered fifteen to twenty fatal blows to her head. Holman also testified that a small drop of blood found on the tongue of one of Belmontes' shoes tested as "type O"--McConnell's blood type.

Dr. Maduros, the pathologist who performed the autopsy on McConnell, testified that she died from cerebral hemorrhaging caused by fifteen to twenty blows to the back left portion of her skull. She had a separate contusion on her right temple, which was caused by a single blow of lesser force that did not lacerate the skin. However, this blow alone would not have caused death and, if it had been the first, it would not likely have caused unconsciousness. Injuries to McConnell's arms, hands, legs, and feet evidenced a struggle. According to Dr. Maduros, there would have been sounds "like a cracked pot" associated with the blows that fractured McConnell's skull, and blood would have splattered in a manner consistent with the blood patterns found on the door jambs in her house.

Belmontes testified in his own defense. He insisted that Vasquez dealt the fatal blows while he, Belmontes, searched the back part of the house for something to take. Belmontes recounted that he and Bolanos had gone over to Vasquez's house, and that when Vasquez mentioned that McConnell would not be home, they decided to steal her stereo. Although they expected McConnell to be away, the plan was that Belmontes would go to the door in case she turned out to be home; because of the unhappy denouement of her party a few days earlier, McConnell would become angry and suspicious if she saw Vasquez or Bolanos at her door. Although Belmontes had met McConnell a few times in the past, she did not know that he was a friend of Vasquez and Bolanos.

Belmontes' version of events was consistent with Bolanos' up to the point of who struck the blows that killed McConnell.

Belmontes agreed that Vasquez and Bolanos stayed in the car while he walked to McConnell's front door. He stated that Vasquez had given him the metal bar to use to break a window; but that he concealed it in his sleeve. According to Belmontes, he knocked at McConell's door and, to his surprise, she answered. As soon as he found out that she was home, he abandoned his intent to burglarize her residence. He told her that he was hitchhiking and had stopped by because it was raining. McConnell invited him in. She noticed a bulge in his sleeve and asked what it was. He showed her the bar and explained that he had it because he was hitchhiking. He used McConnell's bathroom and then stood by the table and talked to her while she ironed clothes. McConnell told him that she was having problems with some people and asked him if he knew Domingo Vasquez. Belmontes said that he had met him.

Belmontes' testimony continued: Five minutes after he entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Belmontes followed behind her and was placing the bar back up his sleeve when Vasquez rapped on the door. Under Belmontes' version, when Bolanos' car backed into the driveway, Vasquez would have had to proceed immediately to the front door; he would not have had time to go to the trunk of the car to attempt to open it.

According to Belmontes, after he knocked at the door to McConnell's house, Vasquez pushed it open, saw McConnell, and ordered Belmontes to "hit her." Belmontes followed Vasquez' directive and, using a backhanded sweeping motion, struck McConnell on the side of her head with the bar. She fell to the floor. Belmontes dropped the bar, ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room. He did not enter the master bedroom. Upon returning to the front of the house, he observed Vasquez standing over McConnell and holding the metal bar. He did not see Vasquez hit McConnell or hear any blows landing because he was not paying attention. He could not explain the presence of defensive bruises and contusions on

McConnell's hands, arms, and feet.

The rest of Belmontes' testimony is, with one significant exception, consistent with Bolanos': Belmontes and Vasquez gathered the stereo components and exited from McConnell's back door. They loaded the stereo components into the trunk. Vasquez got in the back seat, Belmontes rode shotgun, and Bolanos drove. According to Belmontes, while en route, Vasquez handed him the steel bar, which had flesh and hair residue on it, and then Vasquez (not Belmontes) stated that he had had to take out a witness. Belmontes, still wearing his gloves, wiped blood off the bar and set it down on the floorboard. He was uncertain whether there was blood on his pants when he left McConnell's house; he said that the blood might have come off the bar when he placed it on the floorboard. He denied having wiped any blood off of his shoes and asserted that Bolanos and Vasquez told him to throw the bar out his window into the river, and that he complied.

Belmontes concluded his testimony by stating that the three drove to Manuel Vasquez' house, where he changed into a pair of Manuel's pants. Manuel contacted Raul Barron, whom they then met at Irma Vasquez' house. Barron bought the stereo for $100. Bolanos, Vasquez and Belmontes divided the money, bought some beer, and drove to the home of an acquaintance to purchase narcotics.

Belmontes' girlfriend, Barbara Murillo, testified that six months after the murder, she ran into Cobarrubio at the Grape Festival. Murillo believed that Belmontes was the murderer. However, when she asked Cobarrubio for further details about the crime, Cobarrubio claimed that Belmontes had been "set up" because he had no backup in the area, whereas Vasquez had a network of local friends.[2/]

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2. Cobarrubio testified that she recalled running into Murillo at the Grape Festival. Murillo had asked her whether she thought Belmontes "might have been set up." Cobarrubio replied: "Well, he might have."

After three hours of deliberation, the jury convicted Belmontes of first degree murder with special circumstances. It also made special findings that Belmontes was the actual killer and that he had the specific intent that death occur.

C. The Penalty Phase

At the penalty phase, the prosecution introduced minimal aggravating evidence. Detective Holman authenticated two autopsy photographs depicting McConnell's wounds. William Cartwright, manager of a motel in Ontario, California, testified to an incident in early 1979 in which an individual named Rudy met Belmontes at a motel and attempted to sell him a .32 caliber automatic handgun that he had acquired in a burglary. Belmontes reportedly examined the loaded weapon, cocked the trigger, pointed it at Rudy and stated, "I've got it now. Why buy it?" Rudy left the premises and Belmontes retained the weapon.

Steven Cartwright testified that he had a conversation with Belmontes in February 1979 in which Belmontes alluded to the fact that some people were upset with him. As Belmontes talked, he indicated that he had a gun in his belt by slapping his side, and he stated that he was not concerned because he had all the protection he needed. Ron Cutler, a California Youth Authority ("CYA") counselor, testified that he once observed Belmontes swinging a chair as if he were about to hit another ward, but Cutler was able to intervene before a fight ensued. On cross examination, he admitted that Belmontes was significantly smaller than the other youth.

Barbara Murillo testified about a domestic violence incident that occurred when she asked Belmontes to move out of their shared apartment and to give her his keys so he could not come back. During the fight that ensued, Murillo, who was four months

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Cobarrubio testified further that in fact she had no information from any source that Belmontes had been set up but answered as she did because she felt sorry for Murillo.

pregnant with Belmontes' second child, grabbed a "file" for protection and attempted to phone the police, but Belmontes cut the telephone cord with his knife. Belmontes pushed her and hit her on the head, at one point causing her to drop their infant daughter. He tried to choke her, but they were separated by friends who were present. Murillo fled through a window, but Belmontes dragged her back to the vicinity of the apartment. A neighbor eventually summoned the police, who arrived as Belmontes was leaving the premises.

Finally, the prosecution and defense stipulated that Belmontes entered a plea of no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter. The court refused to allow the prosecutor to introduce evidence that Belmontes had actually murdered the victim, Jerry Howard.[3/] Consequently, the jury never heard any details of the murder or Belmontes' alleged role in it.

Belmontes' mitigation presentation was also limited in scope, focusing on two themes: his family and personal history and his capacity for rehabilitation and positive institutional adjustment. It was primarily the latter theme that defense counsel pressed upon the jury.

Belmontes' family history was one of poverty and violence. His maternal grandfather, Michael Salvaggio, testified to his daughter's unhappy marriage to Belmontes' father. Salvaggio recounted that his daughter was sixteen when she ran away from home and married Belmontes' father, who was unemployed, refused to support his family, drank to excess, and beat her. Salvaggio said that he was "very close" to his grandson until Belmontes was about thirteen but after that had little contact

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3. The prosecutor's proffer included testimony from an eyewitness who saw Belmontes shoot Howard, a CYA counselor to whom Belmontes had confessed that he did so, another individual who saw Howard get into a car with Belmontes on the evening he was killed, and the police officer who found the murder weapon at Belmontes' house.

with him. However, Salvaggio continued, when Belmontes was sixteen and his grandmother lay dying in the hospital, he visited her every day; he also attended her funeral.

Carol Belmontes confirmed that her marriage to Belmontes' father was unhappy. Fernando Belmontes, Sr., was a violent alcoholic who "wouldn't ever work," and who beat her, breaking her arm on one occasion and stabbing her on another. Belmontes was ten years old when the marriage broke up. Mrs. Belmontes remarried. That marriage broke up five years later, when Belmontes was about fifteen, after which he became difficult to control. Belmontes had not lived with his mother since he was committed to the CYA two years before McConnell's murder. He had a younger brother and sister, to whom he was "very close."

Belmontes again testified on his own behalf. He recounted that he had a poor relationship with his father, who often came home drunk and hit his mother. He did not like school and stopped attending in the ninth grade. He wanted to get a job so that he could help his mother pay the bills. Although he described his youth as "pretty hard," he twice stressed that he did not want to "use it as a crutch."

Robert Martinez, a close friend of Belmontes since their early teens, testified that he and Belmontes spent a great deal of time together, usually working on Martinez's low-rider car. Belmontes served as best man at Martinez's wedding and was someone he could turn to for advice and support when he argued with his wife. Martinez also testified that he felt Belmontes was not a violent person. However, with defense counsel's consent, this testimony was struck following an objection from the prosecutor, who argued that if this evidence was admitted, the prosecution should be allowed to impeach Martinez with the evidence regarding the Jerry Howard murder.

More important by far was the second mitigation theme--that Belmontes could lead a positive, constructive life if confined

within an institutional setting. The state agrees that Belmontes' counsel, John Schick, presented "substantial evidence" in support of this theme in the form of a series of witnesses who testified to Belmontes' behavior and achievements during his prior CYA incarceration and to the likelihood that he would make positive contributions to the welfare of others if his life was spared. Belmontes himself testified that he was in the custody of the Youth Authority from early 1979 until November 1980, four months prior to the crime. While at the CYA, he was employed on the fire crew at the Pine Grove Camp for one year, during which he worked his way up from last man to number two, a position of leadership and responsibility. Belmontes also testified that during his incarceration he became involved in the M-2 Christian sponsorship program. He admitted that he initially entered the M-2 program as a way to get out of camp, but he explained that he was touched by the decency of his M-2 family, the Haros, and so gradually became curious about Christianity and embraced it.

Belmontes continued by saying that he was paroled from the Youth Authority after serving his maximum sentence; that he stayed at the halfway house in Oakland for two weeks and then went to Southern California for a short period, returning with Murillo to the Lodi area to take a job with the forest service; and that he subsequently moved to Lodi in part so that he could be close to the Haros. However, outside of the institution, Belmontes said, he had trouble maintaining his religious commitment and "started going back to [his] old ways," in part due to "pressure on the streets." At the time of trial, he had not abandoned his religious beliefs but felt that he was no longer "dedicated one hundred percent" to his religious commitment. He testified that he would hope to make positive contributions to society if he were ordered incarcerated, though he had little specific idea of how he might do so.

The Reverend Dale Barrett, chaplain at the Youth Authority's Pine Grove Facility, testified that he knew Belmontes from his participation in the M-2 Christian sponsorship program, which

matched a local church-going family with a ward, who would be permitted to leave the facility to visit with the family at specified times each week. Barrett explained that Belmontes was matched with Beverly and Fred Haro and participated in the program for about a year. In addition, Belmontes was baptized during his stay in the CYA. Only a small percentage of program participants who made a serious commitment to Christianity were baptized. Barrett felt that, unlike the many wards who stayed in the program only to get out of camp and manipulate favors from the sponsoring families, Belmontes had not "conned" them. Barrett testified that although he personally believed in the death penalty, he did not think Belmontes deserved to die because he was a "salvageable" person with "a lot of extenuating circumstances in his life." Barrett was of the view that Belmontes' involvement in the McConnell murder was attributable to "the enormity of the peer pressure and the kind of sociological circumstances that were part of his life," and he thought that if Belmontes were granted a life sentence, he would make positive contributions to prison life through his involvement with the prison ministries.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and the Northern California Director of the M-2 program, testified that he helped place Belmontes in a halfway house in Oakland upon his release from the CYA. Miller stated that, at the time, he felt "a little bit doubtful" about Belmontes' ability to lead a productive life outside of a highly structured environment, like prison. Miller testified that Belmontes stayed at the halfway house for only two weeks before moving to the Lodi area to take a job with the forest service. During those two weeks, however, Belmontes returned to Preston on a few occasions to speak to wards about what life was like "on the outside." Miller described Belmontes (and his message) as well-received by the CYA wards, and he believed that if Belmontes were committed to prison for a life term, he would be good at counseling other prisoners not to make the same mistakes that he had. Miller was enthusiastic about working with Belmontes in this capacity and stated that Belmontes "definitely would be

used in the prison system for this kind of activity" because he related well to other prisoners, especially those who shared his ethnic background, and because these kinds of programs were "at the present time the only solution" to the troubling problem of recidivism among prisoners.

Finally, several witnesses offered evidence with respect to Belmontes' conversion to Christianity, which occurred during his first CYA incarceration, and his failure to maintain his religious commitment upon his release. Martinez's wife Darlene, a born-again Christian, testified that she had known Belmontes for six or seven years and considered him a close friend. Darlene recounted that when Belmontes visited them after his release from the Youth Authority, he told her that he was a born-again Christian. He also mentioned his disputatious relationship with his girlfriend, Murillo, and mentioned that he was planning to move in with her. During the conversation, Belmontes expressed concern that Murillo was not a Christian, and he worried that he would be unable to maintain his Christian faith on his own.

Beverly and Fred Haro, Belmontes' M-2 sponsors and members of Reverend Barrett's church, testified that Belmontes spent Wednesday evenings and weekends with them for almost a year. They felt they had a good relationship with Belmontes, who attended church with them. They treated him like their own son, and he opened up to them and was a good influence on their own teenage son. They saw him several times after his release from the CYA. Fred Haro stated that he had "compassion as a son" for Belmontes and that Belmontes had been genuine in his commitment to the M-2 program and his affection for his sponsors. Beverly Haro felt that Barbara Murillo was a "definite negative factor" in Belmontes' life.

At the conclusion of the evidentiary stage, the court permitted Belmontes to address the jury personally during closing arguments. Belmontes stated that he did not think that his difficult childhood excused h[illegible] role in the McConnell murder.

However, he explained that he could not handle the pressures of life outside of an institution, and he asked the jury to give him "an opportunity to achieve goals and try to better [him]self." Belmontes' attorney similarly stressed that Belmontes could not "make it on the outside." He argued that Belmontes had had a hard life but still retained his humanity. He characterized Belmontes as someone who thrived in a structured environment--as evidenced by his accomplishments while in the CYA--and asked the jury to spare Belmontes' life on the ground that he would make positive contributions if allowed to live out his natural life in prison.

The judge instructed the jury according to the then-standard model jury instructions, which directed the jury to consider as mitigating evidence the defendant's age, criminal history, and "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In addition, the judge read a portion of a supplemental instruction requested by the defense, which stated that the jury should view the statutory factors "merely as examples of some of the factors" that it could consider, that the jury "should pay careful attention to each of these factors," and that "any one of them standing alone" could support a life sentence. The trial judge refused to read the most important part of the requested instruction, which stated: "[Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence." The jury was not informed that it should consider mitigating evidence bearing on Belmontes' probable future conduct if sentenced to life in prison without the possibility of parole. Shortly after Belmontes' trial, the California legislature revised the model jury instructions to make clear that the jury must consider any aspect of the defendant's character or record offered as a basis for a sentence less than death, "whether or not related to the offense for which he is on trial." CALJIC 8.85(k) (6th ed.1996).

The jury deliberated for a day and a half before reaching a

verdict. On the first day, after several hours of deliberations, the jury sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought back to the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can." The trial judge refused to tell the jurors what would happen if they could not agree.

The trial judge emphasized that if the jurors "[went] over the instructions again with one another," they might find it easier to reach agreement. The jurors then asked the judge to clarify the instructions on the weighing of the aggravating and mitigating factors. One juror asked the trial judge whether the jury was supposed to take each listed (i.e., statutory) factor, decide whether it was aggravating or mitigating, and then "balance the sheet." Rather than instruct the jurors that it was their duty to consider and, if appropriate, give effect to, all of the mitigating evidence presented by the defendant, whether comprehended by one of the statutory factors or not, the trial judge responded simply, "That is right," even though no statutory factor comprehended the element of rehabilitation. Shortly thereafter, another juror asked whether it was possible for Belmontes to receive psychiatric treatment while in prison. The trial judge responded, "That is something you cannot consider in making your decision." Following this colloquy, the jury returned a death sentence.

D. Post-Trial

The California Supreme Court affirmed Belmontes' conviction and sentence in 1988, People v. Belmontes, 45 Cal.3d 744, 248 (1988), and the U.S. Supreme Court denied certiorari in early 1989. Belmontes then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, which was held in abeyance while Belmontes exhausted state remedies.

Belmontes filed a state habeas petition and received a stay of execution from the California Supreme Court. The California courts summarily dismissed Belmontes' petition, refusing him compulsory process and denying him an evidentiary hearing on any of his claims. The California Supreme Court finally denied relief in 1992.

In 1993, proceedings on the federal writ commenced before a magistrate judge. In 1996, he denied Belmontes' request for an evidentiary hearing on certain claims but granted his motion to expand the record to include depositions, declarations, and reports submitted by the parties. The parties filed cross motions for summary judgment. In 2000, the district court withdrew the referral from the magistrate judge and, in August of that year, denied relief on all claims except six that had not yet been briefed. The court referred those six claims to the magistrate judge for a recommendation. In January 2001, the magistrate judge recommended denying the outstanding claims, and in May 2001, the district court adopted the magistrate's findings and recommenda-tions, denied the petition, and entered judgment against Belmontes. The district court issued a Certificate of Appealability for fifteen constitutional claims. This appeal timely followed.

II. STANDARD OF REVIEW

Because Belmontes filed his habeas petition prior to AEDPA's effective date, we apply pre-AEDPA standards of review. Woodford v. Garceau, 123 S.Ct. 1398, 1401 (2003). State court factual findings are presumed correct unless one of eight enumerated exceptions applies. See 28 U.S.C. § 2254(d) (1994). The application of law to historical facts is reviewed de novo. Thompson v. Borg, 74 F.3d 1571, 1573 (9th Cir.1996).

III. GUILT PHASE ISSUES

A. Giglio and Napue Claims

Belmontes alleges that the state deprived him of due process by failing to disclose that Bolanos had several misdemeanor charges and that the prosecutor personally helped him achieve favorable dispositions on those charges. In a closely related claim, he contends that the prosecutor violated due process by failing to correct Bolanos' false and misleading testimony that he had never been "busted" before his arrest for the McConnell murder.

1. Factual Background

On the Wednesday morning before the murder, Bolanos drove into a traffic signal on his way home from McConnell's house. A police officer witnessed the accident. After flunking a field sobriety test, Bolanos was taken into custody and charged with various misdemeanor driving offenses, including DUI and hit-and-run.

One week later, Bolanos was charged with first degree murder for his role in the McConnell murder. He soon entered into an agreement in which he pled guilty to second-degree burglary in exchange for testifying against Vasquez and Belmontes. He was granted immunity for his testimony and his sentence was left to the court's discretion. He received no explicit promises of leniency from the prosecution.

After Bolanos pled guilty to the burglary, he obtained a string of unusually favorable dispositions on several traffic offenses. First, with respect to the DUI/hit-and-run charges, his attorney appeared in municipal court along with Clark Sueyres, the district attorney who was prosecuting the case against Belmontes. On Sueyres' motion, the charges were dismissed in the interest of justice. Next, later that year, Bolanos was cited for driving an unregistered vehicle and driving with a suspended license. He was allowed to plead guilty to the lesser charge of driving without a valid license and assessed a $100 fine; the court dismissed the unregistered vehicle charge. The following April, Bolanos was again cited for driving an unregistered

vehicle, driving with a suspended license, operating an unsafe vehicle, and driving with worn tires. Again, Sueyres personally asked the municipal court to dismiss the charges in the interest of justice. Bolanos, once again, pled guilty to driving without a valid license and paid a $75 fine. None of these matters was disclosed to the defense.

At trial, Bolanos admitted on cross-examination that he was testifying under court order in exchange for a grant of immunity and that he would face a murder charge if he refused to testify. However, Schick's efforts to impeach Bolanos were hampered by the fact that Bolanos continually minimized both his own culpability and the benefits he received from the prosecution in exchange for his testimony. For example, Bolanos told the jury that his motive in testifying was "to tell the truth," and he stated that because he "wasn't even around when the crime happened," he did not view the grant of immunity as a particular favor.

In addition, Bolanos was less than truthful when he testified about his prior contacts with law enforcement. When Schick questioned Bolanos about prior inconsistent statements that Bolanos had made to the police, Bolanos explained them by saying that he had made mistakes out of nervousness because it was "the first time I got busted." In fact, Bolanos had been "busted" twice before. In addition to the DUI/hit-and-run incident, Bolanos had previously been arrested for gun possession by Detective Holman, the same officer who arrested him for the McConnell murder. The arrest generated formal criminal charges, and Bolanos was sentenced to thirty days in a juvenile facility, of which he served fifteen.

2. Giglio Claim

The prosecution has an affirmative duty to turn over to the defense all evidence favorable to the accused, including impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 432 (1995); Giglio v. United States, 405 U.S. 150, 154 (1972). The failure to disclose favorable evidence violates due process when

the evidence is material. United States v. Bagley, 473 U.S. 667, 678 (1985); Singh v. Prunty, 142 F.3d 1157, 1161 (9th Cir.1998). Evidence is material if there is a reasonable probability that, had it been disclosed to the defense, the outcome of the trial would have been different. Bagley, 473 U.S. at 682. A reasonable probability occurs when the suppression "undermines confidence in the outcome of the trial." Kyles, 514 U.S. at 434 (internal quotation marks omitted).

Belmontes argues that the prosecutor violated due process by failing to turn over material impeachment evidence consisting of the existence and unusual disposition of Bolanos' misdemeanor traffic offenses. The state responds that the prosecutor had no duty to disclose this evidence because the misdemeanor violations were not mentioned in the plea agreement and were not dismissed as consideration for Bolanos' testimony against Belmontes. In support of this argument, the state cites the deposition testimony of both Bolanos and his attorney to the effect that they did not perceive the dismissal of the traffic offenses as related to the immunity deal.

The state's argument is without merit. We have held that when the state relies on the testimony of a criminal informant, it has an obligation to disclose "all information bearing on that witness's credibility," including "the witness's criminal record ... and any information therein which bears on credibility." Carriger v. Stewart, 132 F.3d 463, 480 (9th Cir.1997). We further emphasized the importance of this rule in Benn v. Lambert, in which we held that "the state cannot satisfy its Brady obligation to disclose exculpatory and impeachment evidence by making some evidence available and asserting that the rest would be cumulative. Rather, the state is obligated to disclose all material information casting a shadow on a government witness's credibility." 283 F.3d 1040, 1057-58 (9th Cir.2002) (internal quotation marks omitted). Here, the fact that the prosecutor personally appeared in municipal court to argue for favorable dispositions of Bolanos' mis-demeanor traffic

offenses casts a shadow on Bolanos' credibility regardless of whether such intervention was mentioned in the plea agreement or offered as consideration for Bolanos' testimony. Had defense counsel known about the existence and disposition of the misdemeanor offenses, he could have impeached Bolanos by showing that he had a motive to say what the prosecution wanted to hear in hopes of obtaining a lighter sentence on his plea to second degree
burglary. Even though Bolanos was not explicitly promised leniency, the fact that the prosecutor helped Bolanos obtain dismissals or reduced punishments on his traffic misdemeanors makes it more likely that he would intercede on Bolanos' behalf when it came time for sentencing on the burglary charge. Thus, the evidence was clearly relevant and admissible for purposes of impeachment, and the district attorney should have disclosed it.

Nevertheless, we hold that Belmontes' Giglio claim fails because, under the particular facts and circumstances of this case, the undisclosed evidence was not material. This case presents different circumstances from those in Benn, in which we held that the prosecutor's dispensation of similar favors on behalf of his star witness--including quashing a traffic ticket, dismissing a burglary charge, and postponing the filing of an arrest warrant until after Benn's trial--were material benefits. Id. In Benn, we held that the failure to disclose these benefits necessitated a new trial, even though the prosecutor disclosed that he had made a deal with the informant to seek a reduced sentence in exchange for his testimony against Benn, and defense counsel impeached the informant on this point. Id.

Aside from the fact that the undisclosed benefits in Benn may well have been more substantial than those at issue here, Benn is distinguishable for three reasons. First, Bolanos was actually involved in the McConnell murder, whereas the informant in Benn was a jailhouse snitch. Evidence that a jailhouse snitch received material benefits from the prosecution is especially important because without that evidence the informant

masquerades as a disinterested observer. See United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir.1993) (describing practice of relying on criminal informants as "fraught with peril"). In this case, however, Bolanos was cross-examined extensively as to his role in the crime and the details of his immunity agreement, so the jury could not possibly have viewed him as disinterested. Second, the impeachment evidence that was disclosed in Benn was relatively trivial; although the informant received sentencing leniency in his unrelated case, the leniency saved him only thirty-five days of jail time. Benn, 283 F.3d at 1057. Accordingly, "the number and nature of the undisclosed benefits was such that they would have impeached [the witness] more effectively" than the benefits that were disclosed. Id. at 1058. By contrast, in the present case the impeachment evidence that was disclosed was substantial: an agreement allowing Bolanos to plead guilty to second-degree burglary and receive immunity for the murder in exchange for his testimony. Finally, in Benn the prosecutor effectively downplayed the importance of the impeachment evidence in his closing argument. Id. (quoting prosecutor's argument that "[t]he reward he got was that in a 6 to 12 month sentence, he got six months instead of nine months. Big reward."). In this case, however, the prosecutor argued that the jury should view Bolanos' testimony critically, and the jury was so instructed. For these reasons, we conclude that Benn does not control our analysis here.

Here, the undisclosed benefits were not material because there is not a reasonable probability that the outcome of the trial would have been different if defense counsel had known about them. In making this judgment, we realize that Belmontes need not pass a sufficiency of the evidence test. Kyles, 514 U.S. at 434. "However, our fundamental concern remains whether there exists a reasonable probability that given disclosure of the evidence of benefits to[the witness], one or more members of the jury would have viewed [his] testimony in a different light." Singh, 142 F.3d at 1163. In this case, Bolanos was impeached with his immunity agreement, including the fact that the charges

filed against him were substantially lower than the evidence would have warranted. The withheld evidence would not have added much, if anything. Moreover, Bolanos' testimony was corroborated by that of several other witnesses, including disinterested witnesses like Lucy Flores and Barbara Murillo, who were not involved in the crime or related to the codefendants. Belmontes' testimony to the contrary was uncorroborated and did not hold up well under cross-examination. Had Bolanos' testimony been less well-supported or the undisclosed benefits been greater, or had the prosecutor not urged and the judge not instructed the jury to view his testimony with suspicion, we might conceivably have reached a different conclusion. Nevertheless, given the extent of the corroborating evidence, the relative unimportance of the undisclosed benefits as compared to those that were disclosed, and the nature of the prosecutor's statement, we cannot say that the jury would have viewed Bolanos' testimony in a different light had it known that the prosecutor had helped him to quash his misdemeanor traffic offenses or obtain lighter punishment on them. In short, the undisclosed benefits do not undermine our confidence in the verdict. In these circumstances, we hold that the withheld evidence was not material, and the claim must, therefore, be denied.

3. Napue Claim

Belmontes also argues that the prosecution violated his due process rights by failing to correct Bolanos' false assertion that he had never been "busted" before. The prosecutor has an independent, constitutional duty to correct testimony he knows to be false. Napue v. Illinois, 360 U.S. 264, 269-70 (1959); N. Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir.2001). If there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury," the conviction must be set aside. United States v. Agurs, 427 U.S. 97, 103 (1976).

The state argues that the prosecution had no duty to correct the

record because defense counsel was notified of the drunkdriving arrest at a pretrial hearing. Whether defense counsel is aware of the falsity of the statement is beside the point. The state overlooks the fact that the prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of "the free standing constitutional duty of the State and its representatives to protect the system against false testimony." Bowie, 243 F.3d at 1118. Therefore, regardless of whether defense counsel should have known that a state witness testified falsely, "[a] prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' Napue, 360 U.S. at 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217, requires [him] to act when put on notice of the real possibility of false testimony." Id.

The state also contends that the prosecution had no duty in this case because the word "busted" is ambiguous, and therefore Bolanos may not have testified falsely at all. We do not find the word "busted" to be ambiguous. See Webster's New World Dictionary 189 (3d college ed.1988) (defining "bust" as "to arrest"). In this case, the prosecutor knew that Bolanos had been "busted" twice before: once for DUI/hit-and-run and once for gun possession. He had an independent duty to correct the false testimony and elicit the truth.

If there were any reasonable likelihood that Bolanos' false testimony could have affected the judgment of the jury, we would be compelled to grant the petition with respect to this claim. Belmontes argues that a reasonable likelihood exists, pointing to the fact that the "first time I got busted" comment arose at a crucial part of defense counsel's cross-examination. Bolanos used this false statement to explain his prior inconsistent statements on two critical points: the length of time Vasquez spent in the house and the alleged knocking noise that Bolanos heard when he got out of the car to open the trunk. He stated that he was nervous when he made the prior inconsistent statements to the officer because he had never been busted before. The testimony that was inconsistent was important

because it tended to incriminate Belmontes and exculpate Vasquez by suggesting that McConnell was killed before Vasquez entered the house; it also was not directly corroborated by any other witness. Conceivably, if the jury knew that Bolanos had lied when trying to explain his prior inconsistent statements on these points, it could have concluded that Bolanos was lying about the timing and the knocking noise, either to please the prosecution or to protect Vasquez. The jury then would have been more likely to believe Belmontes' testimony that Vasquez was the actual killer.

Ultimately, however, we do not believe that Bolanos' false testimony regarding the absence of prior arrests could have affected the judgment of the jury. As we explained, his testimony regarding the events surrounding the murder was in most respects corroborated by independent witnesses. Furthermore, the most damaging testimony of the trial came from Belmontes himself. On cross-examination, Belmontes conceded that for his version of events to be true, Vasquez would have had to have come directly from the car to the door without attempting to open the trunk, and there is direct evidence to the contrary from a disinterested eyewitness. Moreover, Belmontes refused to say that he had seen or heard Vasquez hitting McConnell, and he could not explain how Vasquez would have had enough time to both murder McConnell and ransack the front bedroom. Finally, Belmontes, but not Vasquez, had blood sprinkled on his clothes and shoe. On this record, we hold that there is no reasonable likelihood that Bolanos' false testimony that his arrest in connection with the McConnell murder was "the first time I got busted" would have affected the judgment of the jury. We therefore deny relief on this claim.

B. Conflict of Interest

Belmontes contends that he was deprived of due process and the effective assistance of counsel due to a conflict of interest arising from Schick's multiple prior representations of Vasquez. See

Cuyler v. Sullivan, 446 U.S. 335 (1980). At the heart of the claim is the allegation that Schick, because of the conflict of interest, did not offer evidence of Vasquez's violent criminal history in support of his defense theory that Vasquez was the actual killer.[4] Belmontes argues that this evidence was relevant and admissible for two purposes: first, to show that Vasquez was, in fact, the actual killer; and second, to impeach Bolanos' credibility by showing that his fear of retaliation by Vasquez caused him to place the blame on Belmontes, rather than on the true murderer.

1. Factual Background

During pretrial proceedings, Vasquez's attorney brought a motion to recuse Schick as counsel for Belmontes. The motion was based on the fact that Schick's law firm had represented Vasquez in a 1979 murder case; Vasquez's attorney feared that Schick had confidential information that he would use against Vasquez as part of his defense theory that Vasquez was the actual killer.[5] Shick opposed the motion and filed a declaration in which he stated: (1) the attorney who represented Vasquez in 1979 had since left the firm; (2) the case against Vasquez was dismissed prior to trial; (3) he himself had acquired no confidential communications from Vasquez; and (4) the case file had been

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4. Belmontes also argues that the trial judge independently violated his due process rights by failing to inquire adequately into the conflict and failing to advise Belmontes about the nature and consequences of the conflict. We do not address this claim because Belmontes cannot prevail on it without showing that Schick labored under an actual conflict of interest that adversely affected his defense, a showing Belmontes cannot make for the reasons explained hereafter. Mickens v. Taylor, 535 U.S. 162 (2002) (extending Cuyler burden of proof to situations in which trial judge failed to inquire into conflict about which he knew or reasonably should have known).

5. Earlier, Vasquez's counsel had successfully moved to recuse Schick's investigator. This investigator had previously worked on Vasquez's 1979 murder case, and at the time of Belmontes' trial he worked part-time in the public defender's office, which represented Vasquez in the McConnell murder.

destroyed eight months earlier. The trial judge held a hearing and, based on these facts, denied the motion. The judge asked Belmontes if he wished to retain Schick as his lawyer, knowing that Schick's firm had previously represented Vasquez. Belmontes said that he did.

In postconviction proceedings, Belmontes' attorneys learned that Schick's connection to Vasquez was, in fact, much more extensive than he had disclosed to either Belmontes or the trial court. Prior to entering private practice, Schick and the members of his criminal defense firm had worked at the local public defenders' office. There, Schick and the members of his firm represented Vasquez on three occasions in addition to the 1979 murder charge. In August 1974, Schick had himself represented Vasquez on a gun possession charge; he had helped Vasquez negotiate a guilty plea. In November 1974, Patrick Riddle, a partner in Schick's law firm, had represented Vasquez on a rape charge.[6] In January 1976, Douglas Jacobsen, the third partner in Schick's firm, had represented Vasquez in a purse-snatching case that went to jury trial. Schick did not notify Belmontes or the court of these incidents of representation even though he remembered them at the time of the recusal motion.

In 1994, Schick signed another declaration with respect to the conflict of interest claim. In that declaration, he averred that at the time of the recusal motion, he saw no relationship between any of Vasquez's prior cases and the McConnell murder. He asserted that his representation of Belmontes was not inhibited by his prior representation of Vasquez and that his loyalty to Belmontes was complete and undivided. Schick stated that he considered calling Vasquez as a witness and would have been prepared to cross-examine him fully had he taken the stand. However, he also admitted that he did not investigate Vasquez's violent criminal history even though doing so would have been helpful to Belmontes' defense. Schick stated that he did not make

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6. Schick avers that he was not aware of this case at the time he represented Belmontes.

a tactical decision not to pursue this investigation. He explained that his normal procedure is to investigate the criminal record of a potential witness; however, he did not consider Vasquez a potential witness until after he had entered a guilty plea.

Schick testified at his deposition that he knew that he had a continuing duty of loyalty to Vasquez, but he did not view Belmontes' defense as conflicting with that duty in any way. However, Schick admitted that he knew that the district attorney could revive the 1979 murder charge against Vasquez at any time (although he also stated that it never crossed his mind that the prosecution would do so as a result of any evidence Schick presented at Belmontes' trial). In addition, Schick recognized that even though Vasquez entered his guilty plea prior to Belmontes' trial, Vasquez had an ongoing liberty interest in being viewed as an aider and abettor in the McConnell murder, and not the actual killer.

2. Discussion

At the outset, we dispose of the state's procedural objections to the claim. The state first contends that the claim is unexhausted because Belmontes did not present to the California Supreme Court all of the facts underlying the claim. This argument fails because "new factual allegations do not render a claim unexhausted unless they 'fundamentally alter the legal claim already considered by the state courts.' " Chacon v. Wood, 36 F.3d 1459, 1468 (9th Cir.1994) (quoting Vasquez v. Hillery, 474 U.S. 254, 260 (1986)). Here, although the additional facts add some evidentiary support to the claim, they do not "fundamentally alter" it. See Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir.1999) (holding that jury misconduct claim was properly exhausted when petitioner presented incidents of improper jury contact that differed in number, but not in kind, from what was presented to state courts). The essential factual and legal theories are the same as those presented to the California courts. Therefore, Belmontes adequately exhausted

the claim.

Next, the state argues that the claim is barred by the Teague nonretroactivity doctrine. See Teague v. Lane, 490 U.S. 1031 (1989). The government bases this argument on the Supreme Court's recent statement that, as far as its own precedent is concerned, the question whether Cuyler extends to cases of successive representation is still open. Mickens v. Taylor, 535 U.S. 162, _____, 122 S.Ct. 1237, 1246 (2002). However, we have held that circuit court holdings suffice to create a "clearly established" rule of law under Teague. Bell v. Hill, 190 F.3d 1089, 1091 (9th Cir.1999). In this circuit, it was well-established at the time that Belmontes' conviction became final that conflicts of constitutional magnitude can arise from cases of successive representation. See, e.g., Mannhalt v. Reed, 847 F.2d 576, 579 (1988); United States v. Wheat, 813 F.2d 1399, 1402 & n. 1 (9th Cir.1987), aff'd on other grounds, 486 U.S. 153 (1988). Accordingly, the conflict claim is not Teague-barred.

We also hold that Belmontes' purported waiver of the conflict of interest was invalid. "For a waiver to be knowing and intelligent, the defendant must have been sufficiently informed of the consequences of his choice." Lockhart v. Terhune, 250 F.3d 1223, 1232 (9th Cir.2001) (internal quotation marks and citations omitted). Here, Schick failed to inform Belmontes or the court of the extent of his prior relationship with Vasquez. In addition, neither Schick nor the trial judge explained to Belmontes that Schick owed a continuing duty of loyalty to Vasquez, a duty that could potentially conflict with Belmontes' defense theory--that Vasquez was McConnell's actual killer. Under these circumstances, we conclude that Belmontes was not sufficiently informed of the consequences of his choice, and his waiver was therefore invalid. See Lockhart, 250 F.3d at 1232-33, citing United States v. Curcio, 680 F.2d 965, 976-77 (8th Cir.1982) (holding that waiver was ineffective when the defendant was informed of possible conflict due to attorney's prior representation of codefendant and told that conflict may arise

from prior confidential communications, but not told that conflict may arise from attorney's continued loyalty to codefendant).

To establish a Sixth Amendment violation based on conflict of interest, the defendant must show that an actual conflict of interest adversely affected his lawyer's performance. Cuyler, 446 U.S. at 338; Mannhalt, 847 F.2d at 579. Generally, it is more difficult to demonstrate an actual conflict resulting from successive, rather than simultaneous, representation. Mannhalt, 847 F.2d at 580. Conflicts of interest based on successive representation may arise if the current and former cases are substantially related, if the attorney reveals privileged communications of the former client, or if the attorney otherwise divides his loyalties. Id. Ultimately, however, an actual conflict of interest is one "that affected counsel's performance--as opposed to a mere theoretical division of loyalties." Mickens, 122 S.Ct. at 1243. In other words, the simple "possibility of conflict is insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350.

We must decide whether the potential conflict of interest engendered by Schick's prior representation of Vasquez ripened into an actual conflict. We begin by noting that there is no suggestion that Vasquez's prior cases were substantially related to the McConnell murder or that Schick was in possession of privileged communications from Vasquez. Therefore, if Belmontes is to demonstrate an actual conflict, he must show that Schick "divide[d] his loyalties" between Vasquez and Belmontes. Fitzpatrick v. McCormick, 869 F.2d 1247, 1252 (9th Cir.1989), citing Mannhalt, 847 F.2d at 580. In engaging in this inquiry, we look beyond Schick's protestations to the contrary to see whether independent evidence in the record supports the allegation of divided loyalties. United States v. Shwayder, 312 F.3d 1109, 1119 (9th Cir.2002) ("Human self-percep-tion regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it.");

Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir.1994) ("The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict.").

After a careful examination of the record, we find no evidence that Schick divided his loyalties between Vasquez and Belmontes. Indeed, Belmontes' entire defense was that Vasquez was the killer. This case is thus distinguishable from cases like Lockhart, Sanders, and Fitzpatrick, all of which addressed situations in which defense counsel sabotaged their current clients' case by refusing to raise the obvious defense that a former client was actually responsible for the murder. See Lockhart, 250 F.3d at 1230-31 (where the evidence showed that the same person had committed both an earlier murder and the murder for which defendant was on trial, defendant's trial counsel refused to present evidence that his former client had committed the earlier murder); Sanders, 21 F.3d at 1453(defense counsel successively represented two brothers who were accused of the same murder; the first brother confessed his guilt to defense counsel, who advised him to take the Fifth at his brother's trial; at the trial, defense counsel put forth an unconvincing alibi defense rather than evidence that the first brother had committed the murder); Fitzpatrick, 869 F.2d at 1251-52(defense counsel refused to present defense that a former client actually committed the murder; because of the prior attorney-client relationship, defense counsel believed in the former client's innocence to the detriment of his current client).

Belmontes argues nevertheless that an actual conflict of interest affected Schick's performance at his trial. According to Belmontes, even though Schick argued that Vasquez was the killer, he failed to support this theory with hard evidence. Belmontes asserts that Schick should have investigated Vasquez's lengthy criminal record and presented it as evidence that Vasquez was the actual killer. He also asserts that Schick should have impeached Bolanos by showing that he was in fear

for his life due to death threats issued by Vasquez and thus had a powerful motive to falsely shift the blame from Vasquez to Belmontes. Belmontes argues that the only possible explanation for these lapses on Schick's part is that he felt bound by a continuing duty of loyalty to Vasquez, and that this duty required him to refrain from presenting evidence that could have resulted in the revival of the 1979 murder prosecution or impaired Vasquez's prospects for an early parole on his second degree murder conviction in the current case.

We are of the view, however, that these alleged failings are too speculative to sustain a conflict of interest claim. This is not a case in which Schick failed to present evidence that went directly to Vasquez's--and therefore Belmontes'--guilt or innocence. Rather, Schick sought squarely to place the blame on Vasquez, and did not overlook any direct evidence on that point. He simply failed to investigate and present evidence of Vasquez's prior bad acts, which, if admissible, might have marginally affected whether a jury would have had a reasonable doubt as to Belmontes' guilt. Given the absence of evidence suggesting that Vasquez was the actual killer and given the damaging nature of Belmontes' own conflicting statements, any counsel might have failed to investigate and offer evidence regarding Vasquez's criminal history. In short, we hold that this failure, standing alone, is not enough to show that Schick divided his loyalties between Vasquez and Belmontes. It is not "likely" that a conflict caused Schick to handle Belmontes' case as he did. See United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir.1992). Thus, Belmontes has not shown that he was deprived of his Sixth Amendment rights by an actual conflict of interest.

C. Involuntary Statement

Belmontes argues that the prosecutor violated his due process rights by introducing into evidence his involuntary, inculpatory statements. However, Belmontes testified in his deposition that he spoke to the police freely and voluntarily. There was no due process violation here.

D. Counsel's Failure to Challenge Arrest Warrant

Belmontes claims that his trial counsel was constitutionally ineffective for failing to challenge his arrest warrant. He argues that the warrant in his case was facially insufficient to support a finding of probable cause because nothing in the warrant corroborated the allegation that Belmontes himself, as opposed to Bolanos, was involved in the crime.[7]

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7. The warrant reads:

Detective Elbert Holman, San Joaquin County Sheriff's Office, will testify that: he responded to 17281 N. Sunrise St. Victor, CA on 3/15/81 in the early afternoon. The house was ransacked.

Deputy St. Sure will testify he was the first deputy Sheriff to arrive at 17281 N. Sunrise. Steacy Mc Connell was on the floor being administered to by medical personnel. Steacy McConnell subsequently died.

Dr. Madieros did the autopsy on Steacy McConnel. The cause of death was blunt trauma to the head.

Bob Bolanos, after being advised of his Miranda rights, waived those rights and told Detective the following: That he went to the home of Domingo Vasquez, Jr. He was with Fernando Delmontes on 3/15/81. While at the Vasquez house, Vasquez called Stacy Mc Connell. Thereafter, the three of them talked about the fact that Steacy possessed some expensive property at her residence. Fernando Delmontes said he needed money to send to his wife in Los Angeles. Delmontes decided to burglarize the McConnell residence after Vasquez told them McConnell would not be home. Vasquez and Bolanos agreed to go with Delmontes. Bolanos drive them to McConnell's in his car. Upon arriving in the vicinity, Delmontes got out, carrying an iron bar he had brought with him from Vasquez's house.

Delmontes told Bolanos to wait in the car for 30 minutes, then to drive to McConnell's and get him.

1. Strickland Claim

In order to prevail on his ineffectiveness claim, Belmontes must show that: (1) his trial counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable
probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 686 (1984). To satisfy Strickland's prejudice prong in a Fourth Amendment context, Belmontes must demonstrate a reasonable probability that a motion to suppress would have succeeded and that the suppression of the warrant would have led to a different outcome at the trial. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error. See id. at 384.

At the time of Belmontes' trial, the federal Aguilar- Spinelli test applied to affidavits supporting warrant applications. Aguilar-Spinelli did not require independent corroboration of the facts set forth in the affidavit. Rather, under Aguilar-Spinelli, the affidavit on its face had to provide enough information so that a magistrate could determine: (1) that the informant was reliable (the "veracity" prong); and (2) that his information was dependable (the "basis of knowledge" prong). Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964); United States v. Larkin, 510 F.2d 13, 15 (9th Cir.1974). Under federal law, the affidavit met both prongs. Because the

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When they drove to McConnell's, they opened the trunk, and Vasquez went into the house. Vasquez carried stereo speakers from the house to the car trunk. Delmontes followed Vasquez out with the receiver portion of the stereo. Delmontes was splattered with blood. Vasquez was not. Delmontes said McConnel was in the house, and when Bolanos drove up, he beat her with the iron bar. The stereo was later sold, and the proceeds divided.

affidavit stated that Bolanos acquired his information through first-hand observation, it satisfied the "basis of knowledge" prong, Aguilar, 378 U.S. at 114, and because it contained a statement against penal interest, it satisfied the veracity prong. United States v. Harris, 403 U.S. 573, 583-84 (1971) (holding that, in most cases, statements against penal interest are inherently reliable); but see United States v. Hall, 113 F.3d 157, 159 (9th Cir.1997) (declining to apply Harris to accomplice informant because "once a person believes that the police have sufficient evidence to convict him, his statement that another person is more important to his criminal enterprise than he gains little credibility from its inculpatory aspect").

Nor would the claim have had a reasonable probability of success under California law. According to the California Supreme Court, the affidavit contained sufficient corroboration to support a finding of probable cause:

> The circumstances of the crime and evidence found at the crime scene--as summarized in the affidavit--corroborated Bolanos' statement.... [T]rial counsel could reasonably have concluded that the affidavit contained sufficient corroboration of Bolanos's hearsay statement; that the arrest warrant thus issued on probable cause; and that a de novo motion to quash the warrant would have proved futile.

People v. Belmontes, 45 Cal.3d 744, 768 (1988). We are bound by statements of the California Supreme Court as to California law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions."). Accordingly, we must conclude that Schick would not have had a reasonable probability of success in challenging the arrest warrant. Thus his failure to challenge the warrant does not constitute ineffective assistance of counsel.

2. Franks Claim

Belmontes also alleges that material omissions in the affidavit caused the magistrate to issue a warrant for which there was no probable cause. See Franks v. Delaware, 438 U.S. 154, 156 (1978). Under Franks, if a criminal defendant establishes by a preponderance of the evidence that an officer recklessly omitted material information from the affidavit, and if the affidavit considered with the omitted evidence is insufficient to establish probable cause, then the "warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking." Id.

On appeal, Belmontes did not specify what evidence was omitted from the warrant, but he did refer to the California Supreme Court opinion, which described four categories of evidence: (1) The affiant, a police officer, was familiar with Vasquez's violent history but did not know Belmontes; (2) Bolanos's car had been identified at the scene of the crime; (3) Bolanos offered his statement only after his car was impounded and his girlfriend had incriminated him; and (4) at first, Bolanos lied when speaking to the police. Belmontes, 45 Cal.3d. at 769. Three of these omitted facts cast aspersions on Bolanos' credibility because they highlight his strong motive to shift the blame for McConnell's death to someone else. The fourth is plainly of no relevance. As to the three, the face of the affidavit makes clear that Bolanos was Mirandized, which itself indicates that Bolanos was a suspect in the crime. The omitted details add more color to Belmontes' claims, but they do not change the basic calculus involved in determining Bolanos' reliability. Accordingly, they are not material, and the Franks claim must be denied.

E. Doyle Claim

Belmontes asserts that the prosecutor violated his due process rights by cross-examining him as to his post-arrest silence in violation of Doyle v. Ohio, 426 U.S. 610 (1976). However, the Supreme Court has held that Doyle does not apply to a defendant who has waived his Miranda rights and voluntarily given a statement to the police. Anderson v. Charles, 447 U.S. 404, 408

(1980). Belmontes testified in his deposition that he understood his Miranda rights, waived them, and spoke freely and voluntarily to the police. No Doyle error occurred.

F. Unconstitutional Restriction on Cross-Examination

Belmontes contends that the trial judge violated his Sixth Amendment rights by unconstitutionally restricting his cross-examination of Karrie Lynn Vasquez, Vasquez's wife. Ms. Vasquez testified that she saw Belmontes take the iron bar from the kitchen and heard him admit to killing McConnell. Defense counsel sought to impeach her testimony by demonstrating that she was lying in order to increase Vasquez's chances at an early parole by emphasizing Belmontes' greater culpability. This strategy was foiled because the trial judge refused to allow defense counsel to question Ms. Vasquez as to her knowledge of the length of Vasquez's sentence.

The Confrontation Clause protects a defendant's right to cross-examine witnesses as to potential bias. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). However, the trial judge retains considerable latitude to impose reasonable limits on cross-examination based on harassment, prejudice, confusion of the issues, and relevance. Id. Any error is subject to harmless error review. Id. at 684.

Despite the fact that the trial judge prevented defense counsel from exploring Ms. Vasquez's bias with respect to the length of Vasquez's sentence, defense counsel cross-examined her extensively and effectively. Defense counsel elicited testimony that Ms. Vasquez had known her husband for eight years, bore his child, stayed with him in spite of his frequent infidelity, married him while he was in prison for the McConnell murder, and visited him in jail every weekend. The jury thus had ample reason to believe that Ms. Vasquez was biased in favor of her husband. In addition, counsel forced Ms. Vasquez to admit that, although she had been questioned extensively during the police

investigation, it was not until the day before Belmontes' trial that she first claimed to have heard him admit to the crime. This testimony strongly suggested that Ms. Vasquez was lying about what she claimed to have heard. Ms. Vasquez could not have been impeached much more effectively.

In light of the extensive and effective cross-examination that occurred, and the minimal amount of additional force the excluded material would have added, the error, if any, could not have had a substantial and injurious effect on the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993). Accordingly, we deny relief on this claim as well.

G. Evidentiary Errors

Belmontes argues that his trial was rendered fundamentally unfair by the introduction of hearsay and double-hearsay statements supporting Bolanos' testimony that Belmontes was the actual killer. However, the California Supreme Court held that these statements were properly admitted prior consistent statements. We are bound by the opinion of the California Supreme Court in these matters of state law. Estelle, 502 U.S. at 67-68. As the Court has stated, "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." Marshall v. Lonberger, 459 U.S. 422, 438 n. 6 (1983). Here, the statements added little and did not render the trial fundamentally unfair.

H. Instructional Error

Belmontes also challenges an instruction directing the jury not to speculate as to why other individuals involved in the crime were not on trial along with Belmontes. He claims that this instruction prevented the jury from considering the impact of Bolanos' immunity agreement on his credibility. We must determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72 (internal quotation marks omitted). We conclude that

it did not, because the jury was also instructed that it should view Bolanos' testimony with suspicion due to his involvement in the crime. Accordingly, we deny this claim also.

I. Fair Cross-Section

Belmontes alleges that he was deprived of a jury comprised of a fair cross-section of the community because of the systematic exclusion of minority jurors from the venire. However, he provides no statistical data in support of his claim. Belmontes' claim is thus barred by our decision in Thomas v. Borg, 159 F.3d 1147 (9th Cir.1998). In that case, the petitioner argued that we should excuse his failure to provide the necessary statistical evidence because his trial counsel was constitutionally ineffective for failing to preserve it. Id. at 1150. We held:

> [F]or purposes of our fair cross-section analysis, the reason for Thomas' lack of evidence is immaterial. Because Thomas has provided us with insufficient statistical evidence to determine whether blacks were substantially underrepresented on jury venires or panels in Kern County at the time of his trial, his Sixth Amendment fair cross-section claim must be denied.

Id. at 1150-51. Applying Thomas to the facts of this case, we must deny the claim.

J. Jury Misconduct

Belmontes contends that the district court erred in denying him an evidentiary hearing on his juror misconduct claims. A habeas petitioner must meet two conditions to be entitled to a federal evidentiary hearing: He must (1) allege facts which, if proven, would entitle him to relief, and (2) show that he did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding. Id. at 1126-27. A petitioner who meets these conditions must receive a hearing. See, e.g., Williams v. Taylor, 529 U.S. 420 (2000) (holding that because

prisoner diligently pursued claim in state court, and was denied a hearing, he was entitled to a hearing in federal court); United States v. Navarro-Garcia, 926 F.2d 818, 822 (9th Cir.1991) ("Unless the court is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing must be held.").

Belmontes first asserts that the jurors based their decision on the view that "life without possibility of parole did not mean that Belmontes would spend the rest of his life in prison." Belmontes is not entitled to relief on this claim because it concerns intrinsic jury processes. "[I]ntrinsic jury processes will not be examined on appeal and cannot support reversal." United States v. Bagnariol, 665 F.2d 877, 887 (9th Cir.1981).

Belmontes next alleges that the jurors had improper contacts with members of the victim's family. He bases this contention on an excerpt from the record in which the trial court reprimanded one of the jurors for talking to the victim's father about motorcycles. After the reprimand, the trial court conducted a hearing and determined that the juror was not biased as a result of his contact with the victim's father. Belmontes does not assert either that the hearing was not full or that it was not fair. Nor does he assert that he has any newly discovered evidence. Accordingly, he is not entitled to a federal evidentiary hearing on this claim.[8/]

Third, Belmontes asserts that several jurors prejudged his guilt and engaged in premature deliberations. However, even assuming that the jurors did the latter, Belmontes would not

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8. Moreover, the state court's factual determination is subject to a presumption of correctness. Patton v. Yount, 467 U.S. 1025, 1037 n. 12 (1984); 29 U.S.C. § 2254(d) (1994). To overcome the presumption, Belmontes must establish by clear and convincing evidence that the state court's factual finding was erroneous. Patton, 467 U.S. at 1037 n. 12. However, he submitted no evidence tending to overcome the presumption, and the record contains none.

necessarily be entitled to relief. See, e.g., United States v. Klee, 494 F.2d 394, 396 (9th Cir.1974) (denying motion for new trial even though jurors discussed the case during breaks and expressed premature opinions about the defendant's guilt). A petitioner must allege facts which, if proved, would show that the premature deliberations prejudiced him to the extent that he did not receive a fair trial. United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir.1977). Belmontes has not done so here; indeed, he has not alleged any facts other than that premature deliberations took place.

As to the alleged juror prejudgment, in his Amended Petition for Writ of Habeas Corpus, Belmontes contends that "[a] sitting juror remarked, 'Here comes the killer,' whenever petitioner was brought into court." While this claim, if true, might possibly entitle him to relief, see Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.1998) (en banc) ("The bias or prejudice of even a single juror would violate [a criminal defendant's] right to a fair trial."), Belmontes did not include the issue in his request for an evidentiary hearing or present any facts that would entitle him to relief. Accordingly, the district court did not err in failing to afford him a hearing on that claim.

Because Belmontes has not alleged facts that, if true, would entitle him to relief, we affirm the district court's denial of an evidentiary hearing on his jury misconduct claims.

IV. SPECIAL CIRCUMSTANCES ISSUES

A. Racial Discrimination in Charging

Belmontes alleges that the charging decision in his case violated the Eighth Amendment and the Equal Protection Clause because it was infected by racial discrimination against defendants whose victims were white. In support of his claim, Belmontes relies on an expert report prepared by Richard Berk, a well-respected professor of sociology and statistics at the University of California, Los Angeles. Berk analyzed prosecutors' charging

decisions in 122 death-eligible homicides committed in San Joaquin County from August 1977 through 1986.[9] In order to describe accurately the role of race and ethnicity in death penalty charging, he coded data for over 450 variables. After running numerous logistic regression tests, Berk concluded that the odds of being charged with special circumstances varied significantly according to the race of the victim. A defendant who killed a white person was five times more likely to be charged with special circumstances than a defendant who killed an African American and twenty times more likely to be charged than if the victim were Latino. Predictably, however, the government's experts reviewed Berk's report and the underlying data and opined that the data did not reveal a pattern of discriminatory charging in San Joaquin County. For the purposes of this opinion, we assume the accuracy and statistical validity of the Berk report.[10]

Belmontes' claim of discriminatory charging is essentially a selective prosecution claim, and we analyze it under that rubric. Selective prosecution doctrine, however, poses significant hurdles for Belmontes. The government retains broad discretion as to whom to prosecute. Wayte v. United States, 470 U.S. 598, 607 (1985). Because the decision to prosecute is based on such factors as the strength of the case, the government's enforcement

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9. The data set consisted of probation department reports for all death-eligible homicides charged during the relevant time period, except 70 cases for which the County lacked complete reports, 52 cases in which the defendants were not bound over for trial on murder charges, and six cases in which the defendants were female.

10. The district court questioned the relevance of the Berk report on the ground that Berk based his conclusions on "a model that used only four non-racial factors." Although the tables printed in the report contained only four non-racial variables, the report stated that Berk and his team actually considered many other variables in addition to those set forth in the tables. In his declaration, Berk characterized the small, six-variable model as "simply a summary" and stated that he considered all the variables in the data set, which included many non-racial factors. We have no reason to disbelieve Berk's sworn statement and can only conclude that the district court was mistaken.

priorities, and the case's relationship to those priorities, the Supreme Court has stated that such decisions are "particularly ill-suited to judicial review." Id. at 607. Therefore, a presumption of regularity supports prosecutorial judgments, and "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." United States v. Armstrong, 517 U.S. 456, 463, 464 (1996) (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)). "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

Yet, there is a line the prosecution may not cross. Although prosecutorial discretion is broad, it is not unlimited. United States v. Batchelder, 442 U.S. 114, 125 (1979). Rather, "a prosecutor's discretion is 'subject to constitutional constraints.' " Armstrong, 517 U.S. at 464 (quoting Batchelder, 442 U.S. at 125). The decision to prosecute may not be based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights. Armstrong, 517 U.S. at 464; Wayte, 470 U.S. at 608. Likewise, the decision to charge the death penalty cannot rest on criteria that offend the Constitution. McCleskey v. Kemp, 481 U.S. 279, 293 (1987); Adamson v. Ricketts, 865 F.2d 1011, 1022-23 (9th Cir.1988) (en banc), abrogated on other grounds, Walton v. Arizona, 497 U.S. 639 (1990), overruled, Ring v. Arizona, 536 U.S. 584 (2002).

In order to prevail on a selective prosecution claim, a defendant must show that the prosecutorial policy both had a discriminatory effect and was motivated by a discriminatory purpose. Armstrong, 517 U.S. at 465; see also McCleskey, 481 U.S. at 292 ("[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in his case acted with discriminatory purpose."). To establish a discriminatory effect in a race discrimination case, a defendant must prove that

similarly situated individuals of a different race, or whose victims were of a different race, were not prosecuted. Armstrong, 517 U.S. at 467.[11/]

We reject the government's contention that the Supreme Court rejected similar statistical evidence in McCleskey v. Kemp, and that Belmontes' statistics are therefore "insufficient as a matter of law." The factual showing made by McCleskey was materially different from the showing made in this case. In McCleskey, the Supreme Court reviewed the claim of a Georgia prisoner who alleged that the Georgia capital sentencing statute violated the Equal Protection Clause because it was administered in a racially discriminatory manner. 481 U.S. at 286. In support of his claim, McCleskey offered a sophisticated statistical study that demonstrated that Georgia defendants whose victims were white were 4.3 times as likely to receive a death sentence as those whose victims were black. Id. The Court denied his claim, holding that McCleskey's statewide statistics did not meet his burden of proving that the imposition of the death penalty in his

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11. In Armstrong, the Supreme Court stated that "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. 517 U.S. at 465" (emphasis added). Belmontes' statistics do not meet this showing. Nevertheless, although Belmontes' claim is based on the race of his victim, not his own race, we do not read this sentence as barring our review. In McCleskey, the court examined a statistical study that showed statistical disparities according to the race of the victim. 481 U.S. at 286-87. In that case, the State argued that McCleskey did not have standing to raise a discrimination claim based on his victim's race. Id. at 291 n. 8. The Court concluded that McCleskey did have standing to raise this claim, id., and it addressed directly McCleskey's argument that he was "discriminated against ... because of the race of his victim." Id. at 292. Armstrong did not discuss the issue of the victim's race at all, nor did the majority opinion even mention McCleskey. That question was simply not before the Court. In short, we are confident that Armstrong did not intend to overrule the pertinent portion of McCleskey. Accordingly, we conclude that a defendant may bring a selective prosecution claim based solely on the race of his victim, and that to establish a discriminatory effect in a race-of-the-victim case, he must show that similarly situated individuals whose victims were of a different race were not prosecuted.

particular case was the product of purposeful discrimination. *Id.* at 293 similarly refused to allow petitioners in California and Arizona to submit statistics that demonstrated racial disparities in the imposition of the death penalty statewide as evidence of discrimination in an individual case. See Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir.1992) (en banc) (Arizona); Harris v. Pulley, 885 F.2d 1354, 1374-75 (9th Cir.1989) (California). Unlike McCleskey, Carriger, and Harris, however, Belmontes offered statistics that provided information limited to the charging entity--the San Joaquin County District Attorney's Office--and its death penalty charging practices over time. Thus he provided what the statistics in McCleskey lacked: information specific to the decisionmaker in his case. We conclude that statistics relating to the charging entity, such as those presented by Belmontes, are materially more probative of discrimination in capital charging than those considered by the Supreme Court in McCleskey. See United States v. Bass, 536 U.S. 862 (2002) (approving of "a showing regarding the record of the decisionmakers in respondent's case"). Thus, Belmontes' proffered statistics are not barred by McCleskey and may support a prima facie showing of unlawful charging discrimination

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We next confront the question whether Belmontes' proffered statistical evidence proves a "discriminatory effect" under Armstrong. The statistics show that defendants whose victims were white were charged with special circumstances 30% of the time, whereas similarly situated defendants whose victims were African American or Latino were charged with special circumstances only 19% and 6% of the time, respectively. Because Belmontes' statistics revealed that individuals whose victims were white were far more likely to be charged with a capital offense than similarly situated individuals whose victims were non-white, we conclude that Belmontes established the requisite discriminatory effect. See id. (approving of statistical evidence that assesses whether similarly situated individuals were treated differently).

Under Armstrong, however, a discriminatory effect is not

enough; Belmontes must also show that the decisionmakers in his case acted with a discriminatory purpose. Armstrong, 517 U.S. at 465. Here, Belmontes must show that the San Joaquin County District Attorneys Office pursued a death sentence in his case "at least in part because of" the race of his victim. Wayte, 470 U.S. at 610 (internal quotation marks omitted). Because Belmontes offered no non-statistical evidence on this point, we must decide whether his statistical evidence constitutes a prima facie showing of an intent to discriminate on the part of San Joaquin County District Attorney's Office.

The Supreme Court has not determined whether statistics relating exclusively to the prosecuting authority are sufficient, standing alone, to establish a prima facie claim of discriminatory intent in a capital charging case. On the one hand, the Court "has accepted statistics as proof of intent to discriminate in certain limited contexts," McCleskey, 481 U.S. at 293, and has held that appropriate statistics may be enough to establish a prima facie case in a number of circumstances, including challenges to the composition of the jury venire, id., Title VII employment discrimination, id. at 294, legislative redistricting, Hunt v. Cromartie, 526 U.S. 541, 548-49 (1999) and contemporaneous challenges to a prosecutor's acts. See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986). In addition, the Court has recently reaffirmed Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which the petitioner, a Chinese laundry owner, relied entirely on statistics to prove that the City of San Francisco engaged in purposeful discrimination. See, e.g., Armstrong, 517 U.S. at 464-65; McCleskey, 481 U.S. at 293 & n. 12. On the other hand, the Court has held that statistical evidence, standing alone, is not enough to make out a prima facie case of discrimi-nation with respect to a jury's verdict. See McCleskey, 481 U.S. at 294-96 & 295 n. 14. Although language in McCleskey suggests the "impropriety" of requiring a prosecutor to explain his charging decision years after it was made, id. at 296 & n. 17, the Court acknowledged that, generally, when a petitioner makes out a prima facie case of discrimination, a prosecutor must provide an

explanation. Id. & n. 18.[12/]

While we think that Belmontes' statistics provide a strong showing of intentional discrimination, we need not decide whether, in a discriminatory charging case, statistics standing alone can make out a prima facie case. Assuming arguendo that they can and that Belmontes has made out a prima facie case, here the State has provided evidence that is sufficient to overcome that showing. In his deposition, the prosecutor stated that when he decided to pursue a death sentence against Belmontes, he had reason to believe that prior to the McConnell murder Belmontes had shot and killed Jerry Howard. In short, the prosecutor asserted that he pursued a death penalty against Belmontes, not because of McConnell's death alone, but because he believed that Belmontes had actually committed more than one murder. Moreover, the evidence in the record is sufficient to provide a good faith basis for such belief. Thus, there appears to be a legitimate, race-neutral reason for a prosecutor to seek a death sentence in this particular case, and therefore sufficient evidence to rebut the inference of discrimination raised by Belmontes' statistical study. More important, Belmontes does not challenge the state's assertion that the prosecutor's explanation is sufficient to rebut his prima facie case. In his brief, he does not contend that the fact that a defendant is a double murderer is not a valid reason for seeking the death penalty; nor does he argue that the statistics show that racial disparity exists with respect to cases in which the defendant has killed, or is believed to have killed, more than one victim. Accordingly, we conclude that, even if Belmontes' statistics were sufficient to raise a prima facie case of purposeful discrimination, the State has successfully

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12. We note that a decision to charge a capital rather than a non-capital offense is far more significant and important than a decision to challenge a particular juror. A charging decision is made with great deliberation over a period of time and is generally the product of a deliberative process involving more than one person. Moreover, unlike the case of a juror challenge, there is a full record of the relevant events that ordinarily contains all of the objective factors upon which the decision-making would have been based.

rebutted it by offering the prosecutor's legitimate, race-neutral explanation for his actions. We therefore deny the racial discrimination in charging claim.

B. Arbitrariness and Capriciousness in Charging

Belmontes also argues, independent of his discrimination claim, that the charging of special circumstances in his case was so arbitrary and capricious that it violated the Eighth Amendment. According to Belmontes, his crime was one of the least aggravated of death-eligible crimes, yet he was one of only a very few defendants to actually receive the death penalty. In contrast, many defendants who committed far more heinous crimes than he obtained lesser punishments. According to Belmontes, this disparity shows that in San Joaquin County at the time of his trial there was "no meaningful basis for distinguishing the few cases in which [a death sentence] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). Belmontes argues that because the death penalty regime under which he was charged, convicted, and sentenced is indistinguishable from that struck down in Furman, his sentence must be vacated as unconstitutionally arbitrary and capricious.

Belmontes' claim, however, although styled as one of arbitrary death penalty charging, is actually a claim of arbitrary imposition of the death penalty. He does not argue that the prosecutor's decision to charge him with special circumstances was arbitrary and capricious. Rather, he contends that it was arbitrary and capricious to impose the death penalty on him because other defendants who had committed more heinous crimes than he did not receive the death penalty. The Supreme Court considered and rejected this claim in McCleskey. 481 U.S. at 306-12. As we are bound by controlling precedent, we must do the same.

V. PENALTY PHASE ISSUES

A. Instructional Error

Belmontes contends that the trial judge's instructions to the jury prevented it from considering nonstatutory mitigating circumstances relating to the likelihood that he would live a constructive life in prison and make positive contributions to others if granted life without the possibility of parole. Because we conclude that there is a reasonable probability that as a result of instructional error the jury did not consider constitutionally relevant mitigating evidence, and because we believe that the error was not harmless, we grant the petition with respect to the sentencing phase.

1. Factual Background

At Belmontes' trial, the judge gave the jury the then-standard model jury instructions, modified to eliminate four factors that the prosecution and defense agreed had no relevance to the case. The jury was therefore instructed:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of any criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the defendant acted under extreme duress or the substantial domination of another person.

(f) The age of the defendant at the time of the crime.

(g) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.[13/]

The judge also gave the jury half of a supplemental instruction requested by the defense. The part that was given read:

[T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

The other half of the instruction, which the trial judge refused to give, stated: "[Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence."

After several hours of deliberations, the jury sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought

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13. To remain consistent with the text of the statute and the Supreme Court's terminology in Boyde, we will refer to this factor as "factor (k)" or "unadorned factor (k)."

back to the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can." The jurors asked again what would happen if they could not agree, but the court refused to tell them.

The judge asked the jury: "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" The jurors agreed that they needed more time to deliberate. They then asked the following series of questions:

JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?

THE COURT: That was the listing, yes, ma'am.

JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?

THE COURT: That is right. It is a balancing process. Mr. Meyer?

JUROR MEYER: A specific question, would this be an either/or situation, not a one, if you cannot the other [sic]?

THE COURT: No. It is not that.

JUROR MEYER: It is an either/or situation?

THE COURT: Exactly. If you can make that either/or decision. If you cannot, I will discharge you.

JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?

THE COURT: That is something you cannot consider in making your decision.

2. Discussion

The California death penalty statute has a unique mechanism for guiding the jury's discretion. Instead of separate sets of aggravating and mitigating circumstances, the statute features an eleven-factor test which focuses the jury's attention on the specifics of the crime and the background and character of the defendant. Tuilaepa v. California, 512 U.S. 967 (1994); Cal.Penal Code § 190.3. The first ten factors instruct the jury to evaluate various circumstances of the crime and the defendant's age and prior convictions. See Cal.Penal Code § 190.3. The jury itself decides whether these factors are aggravating or mitigating. People v. Benson, 52 Cal.3d 754, 802 (1990). The eleventh factor--factor (k)--is intended to function as a catch- all that will enable the jury to consider any relevant mitigating circumstance that the defendant proffers as a basis for a sentence less than death. The jury is obligated to weigh and balance the aggravating and mitigating circumstances and must impose the death penalty if it determines that the circumstances in aggravation outweigh those in mitigation. See Cal.Penal Code § 190.3.

In this statutory scheme, the importance of factor (k) cannot be overstated. The Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate. Penry v. Johnson, 532 U.S. 782, 797 (2001); see also Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) ("The sentencer ... may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that the Eighth Amendment requires that the sentencer consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). This broad mandate

includes the duty to consider mitigating evidence that relates to a defendant's probable future behavior, especially the likelihood that he would not pose a future danger if spared but incarcerated. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986). Factor (k) provides the only mechanism for allowing the jury to consider a substantial portion of many defendants' mitigating evidence-indeed, all mitigating evidence that does not relate to the circumstances of the crime or the defendant's age and criminal record.

To pass constitutional muster, the trial judge's instructions must convey to the jury that factor (k) compels it to consider all relevant mitigating evidence proffered by the defendant as a basis for a sentence less than death. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." Penry v. Lynaugh, 492 U.S. 302, 319 (1989). Rather, the trial judge's instructions must convey "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Buchanan v. Angelone, 522 U.S. 269, 276 (1998), citing Penry, 492 U.S. at 317-18; Eddings, 455 U.S. at 113-14; Lockett, 438 U.S. at 604.

At the time of Belmontes' trial, factor (k) allowed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The Supreme Court had occasion to review this language in Boyde v. California, 494 U.S. 370 (1990). In Boyde, the defendant had argued that the jury instruction was unconstitutional because there was a reasonable likelihood that the jury would construe the instruction as forbidding it from considering evidence unrelated to the crime--e.g., mitigating evidence relating to the defendant's background and character. However, the Supreme Court held that because of the view "long held by society" that a defendant with a disadvantaged background or emotional or mental problems may be "less culpable than defendants who have no such excuse," the jury was reasonably likely to have understood that the defendant's

evidence of "his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles" could have "extenuate[d] the gravity of the crime even though it [wa]s not a legal excuse for the crime." Id. at 381- 82 & n. 5. The Court held that, because the trial judge instructed the jury that it "shall consider all of the evidence which has been received during any part of the trial of this case," there was no reasonable likelihood that the jury believed that factor (k) prevented it from considering the background and character evidence introduced by Boyde and its bearing on Boyde's commission of the crime. Id. at 383 (emphasis in original).[14/] In other words, the Supreme Court held that the unadorned factor (k), at least when accompanied by an appropriate clarifying instruction, was constitutional as applied to mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense.

The same type of evidence, however, can serve an alternative forward-looking purpose, mitigating in a manner wholly unrelated to a petitioner's culpability for the crime he committed. This alternative purpose has nothing to do with persuading the jury that the defendant is less culpable with respect to the crime because of some aspect of his family background, personal history, character, or mental capacity. Rather, as defined by the Supreme Court in Skipper v. South Carolina, the jury must "consider[ ] a defendant's past conduct as indicative of his probable future behavior " and "draw[ ] favorable inferences" about a defendant's "probable future conduct if sentenced to life in prison." 476 U.S. at 4-5, 106 S.Ct. 1669(emphasis added).[15/]

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14. The Court also defined "extenuates" to mean "lessens the seriousness of a crime as by giving an excuse." Id. at 381.

15. In attempting to extend Boyde to issues of future conduct, the dissent errs by focusing on the temporal nature of the evidence rather than the purpose for which it is introduced. In the instant case, the operative distinction is not between categories of "pre-crime" and "post- crime"

The Court characterized this kind of mitigation as "an inevitable and not undesirable element of criminal sentencing" and stated that, even though these kinds of inferences "would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be mitigating in the sense that they might serve as a basis for a sentence less than death." Id. at 4-5 (emphasis added) (citations and internal quotation marks omitted). Accordingly, the Court held that "[u]nder Eddings, such evidence may not be excluded from the sentencer's consideration." Id. at 5. The Court's opinion in Boyde did not address whether a reasonable jury would have interpreted the unadorned factor (k) instruction to include the use of this same type of evidence for a forward-looking purpose which serves to mitigate without ameliorating the crime. Boyde, 494 U.S. at 382 n. 5 (distinguishing Boyde from Skipper on the ground that Boyde's mitigation evidence "was introduced not to demonstrate that he was a 'model prisoner' like Skipper and therefore unlikely to present a risk of future dangerousness but

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evidence in the sense of when the acts that constitute the evidence occurred, but rather between a jury's use of background and character evidence to mitigate culpability for the crime, as opposed to the use of the same type of evidence to draw favorable inferences about petitioner's probable future conduct. This latter use of the evidence can, as Skipper holds, serve as a wholly separate and independent basis for a sentence less than death.

The dissent also attempts to distinguish Payton v. Woodford, 299 F.3d 815, 828-30 (9th Cir.2002) (en banc), vacated on other grounds, 123 S.Ct. 1785, on remand at 346 F.3d 1204, 2003 WL 22383147 (9th Cir. Oct.20, 2003)(en banc), on similarly erroneous grounds. Post. at 909-10. In Payton, the mitigating evidence fell outside the meaning of factor (k) because its "post-crime" character meant that it served to mitigate without ameliorating the crime itself. Payton, 346 F.3d 1204, 2003 WL 22383147, at *6. Similarly, this alternative use of "pre-crime" evidence can mitigate without ameliorating the crime itself. Thus, the central question is not whether the jury "was able to consider and give effect to all of Belmontes' mitigating evidence," post. at 909 (emphasis added), but rather what mitigating effect the jury understood to be permissible under the instruction as stated. Skipper requires that the jury understand that evidence must be given mitigating effect whether it bears on petitioner's culpability for the crime or instead relates to petitioner's future potential for constructive conduct.

... as part of petitioner's overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties.").

Belmontes contends that his Eighth and Fourteenth Amendment rights were violated because the trial judge's instructions failed to advise the jury to consider the portion of his mitigating evidence that tended to show that he would adapt well to prison and would become a constructive member of society if granted a life sentence. We review this claim of instructional error under the approach set forth by the Supreme Court in Boyde, which directs us to determine whether there is a reasonable likelihood that the jury understood the instruction in a manner that resulted in its failure to consider constitutionally relevant evidence. 494 U.S. at 380. Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hern,[16] the Court has held that we must examine claims of instructional error in light of the record as a whole. Id. at 377. Accordingly, in assessing Belmontes' claim of instructional error, we consider the entire mid-deliberation colloquy as well as the original jury instructions.

We begin with the original instructions. As stated above, Belmontes' jury was instructed to consider and take into account

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16. We reject the government's argument that the mid-deliberation exchange does not count as a jury instruction because it was "rather informal" and occurred after the formal charge. See Shafer v. South Carolina, 532 U.S. 36 (2001) (labeling the trial judge's answer to the jury's mid-deliberation question an "instruction" and criticizing it because it "did nothing to ensure that the jury was not misled"); Bollenbach v. United States, 326 U.S. 607 (1946) (reversing and remanding because a "supplemental instruction" from the trial court following a question by the jury was "simply wrong"); McDowell v. Calderon, 130 F.3d 833, 836 (9th Cir.1997) (en banc), overruled in part on other grounds, Weeks v. Angelone, 528 U.S. 225 (2000) (explaining that the trial judge's duty to instruct the jury adequately "continues until a verdict is reached and returned. As they work towards a verdict, the jurors must stay in the channel charted for them by state law. To this end, they may need ongoing guidance.").

"[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal.Penal Code § 190.3.[17] Most naturally read, this instruction allows the jury to consider evidence that bears upon the commission of the crime by the defendant and excuses or mitigates his culpability for the offense. We now know that such evidence includes background and character, both of which tend to explain why the defendant committed the crime. By its plain language, however, the instruction does not encompass events or considerations that are unrelated to the defendant's culpability. In particular, the instruction does not apply to those forward-looking considerations encompassed by the Supreme Court's decision in Skipper: evidence that allows the jury to evaluate the defendant's probable future conduct if incarcerated for life without the possibility of parole-- specifically, evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment. These important sentencing considerations are simply not in any respect "circumstance[s] that extenuate[ ] the gravity of the crime." See Skipper, 476 U.S. at 4 (stating that lack of future dangerousness does "not relate specifically to petitioner's culpability for the crime he committed"); see also Boyde, 494 U.S. at 382 n. 5.[18] Moreover, unlike in Boyde,

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17. The California legislature has since reformulated the instruction to direct the jury to consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." CALJIC 8.85(k) (6th ed.1996). See also People v. Easley, 34 Cal.3d 858 (1983) (recognizing that unadorned factor (k) had significant potential for jury confusion.).

18. On remand from the Supreme Court, our en banc court recently considered the identical unadorned factor (k) instruction, applying the AEDPA standard of review, a more deferential standard than the one we apply here, and reached the same conclusion on the merits that we do. See generally Payton v. Woodford, 346 F.3d 1204, 2003 WL 22383147 (9th Cir. Oct.20, 2003) (en banc). Although we could adopt the en banc court's

"society" has not had a "long held view" that a defendant's likely future conduct can serve to mitigate or excuse his commission of a serious crime. Rather, the doctrine is a legal concept peculiar to capital punishment cases. Thus, in the absence of a clear instructions on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor.

In the current case, the most important part of Belmontes' mitigation presentation was that the jury should spare his life because he had the potential, if confined within a prison setting, to contribute positively to prison life. Although the record made before the jury included a substantial amount of evidence about his difficult childhood, in his own testimony he repeatedly stated that he did not want to use his rough childhood "as a crutch" or an excuse. Thus, ultimately the more significant evidence related to his conduct during the period of his prior CYA incarceration and to his ability to conform his behavior to societal norms should he be confined within a structured prison environment. Belmontes' counsel argued to the jury that the evidence demonstrated that if granted life without parole, he would adapt well to prison life, would make a positive contribution to the welfare of others, and would not pose a future danger to the guards or the other inmates.

Unlike the background and character evidence in Boyde that tended to mitigate the offense, Belmontes' mitigation evidence was simply not covered by any natural reading of the words of the unadorned factor (k) instruction. To the contrary, that instruction, read most naturally, suggested to the reasonable juror that Belmontes' evidence tending to show his probable future good conduct should be excluded from consideration, and thus that such evidence was governed by the earlier instruction that the jury "consider all of the evidence ... except as you may be

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reasoning here, we reach that same result on the basis of our own independent analysis.

hereafter instructed." At the least, the unadorned factor (k) instruction is ambiguous with respect to Skipper's requirement that the jury be permitted to consider and give effect to evidence bearing on a defendant's probable future good conduct when it decides whether to impose the death penalty, see 476 U.S. at 5, and thus with respect to the jury's right to consider Belmontes' most important mitigating evidence.

The court's supplemental instructions only exacerbated this problem. Belmontes' counsel had requested instructions that would have expressly instructed the jury that it "should not limit [its] consideration of mitigating circumstances to these specific factors," i.e., the factors listed in the original instruction. However, although the trial judge gave part of the instruction requested by defense counsel, he refused to give the most critical portion. Instead, the trial judge gave a set of contradictory instructions that failed to inform the jury that it could consider the portion of Belmontes' mitigating evidence bearing on his probable future conduct. The trial judge started out on the right track by instructing the jury that it should view the statutory factors "merely as examples of some of the factors" that it could consider. However, any clarity gained at the outset of the instruction was immediately undone by a superceding qualifying directive. The judge added, "You should pay careful attention to each of these factors," an instruction that a reasonable juror would almost certainly have understood to refer to the statutory factors, and particularly to the unconstitutionally limiting unadorned factor (k). The trial judge then continued, "Any one of them [i.e., the factors] standing alone may support a decision that death is not the appropriate punishment in this case," implying that only a statutory factor can support a sentence less than death. A juror who followed these instructions would likely think that he could not consider nonstatutory mitigating evidence--evidence not going to culpability--such as testimony tending to show that Belmontes would lead a constructive life if confined permanently within a structured environment. Still, the supplementary instructions did not end the matter.

Compounding the problems with the original and supplemental instructions were the trial judge's responses to the jurors' questions during the mid- deliberation colloquy. In that colloquy, the trial judge again directed the jury's attention to the literal text of the original unadorned factor (k) instruction, which strongly implied that the jury could not consider evidence regarding the defendant's probable future conduct. The jury had deliberated for several hours before it sent the judge a note indicating that it was deadlocked. The note read, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" In the discussion that followed, the judge properly ascertained that further deliberations would probably be fruitful. He then suggested to the jury that it might be helpful to "go over the instructions again with one another" as they continued to deliberate. It was at this point that the jurors began to question the judge with respect to the aggravating and mitigating factors. Juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that was the listing?" When the court responded affirmatively, she asked, "Of those certain factors we were to decide one or the other and then balance the sheet?"

Juror Hern's questions reveal that she did not understand that her duty as a juror was to consider all of Belmontes' mitigating evidence. The most reasonable way to interpret her first question is as an effort to clarify that the jury should look to the statutory factors (a) through (g) [or unadorned (k)], as read to the jury by the trial judge, to determine what counted as aggravating and mitigating circumstances. It appears that by asking, "that was the listing?," Juror Hern wanted confirmation that there was a finite list of factors for the jury to consider and that the list consisted of the statutory factors read to the jury by the judge. This interpretation is reinforced by Juror Hern's next question: "Of those certain factors, we were to decide one or the other [e.g., whether the evidence is aggravating or mitigating] and then balance the sheet?" The structure of this question separates the "certain factors" that appear in "the listing" from other factors that may not be reflected there. It makes it clear that at least one

juror believed that the jury should consider, weigh, and balance only "those certain factors" that appeared in "the listing." Of course, such a belief would have been incorrect; the jury was required to consider and evaluate Belmontes' mitigating evidence relating to his potential adjustment to life in prison regardless of the fact that it was not listed in the statute.

In any event, Juror Hern's questions signified that she was not sure how to follow the judge's instructions.[19/] "When a jury

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19. The Supreme Court has frequently accepted jury questions as evidence that the trial judge's original instructions were not sufficiently clear. See, e.g., Shafer, 121 S.Ct. at 1273 ("Shafer's jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means."); Simmons v. South Carolina, 512 U.S. 154, 178 (1994) ("[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison."); Bollenbach, 326 U.S. at 612 ("The jury's questions ... clearly indicated that the jurors were confused."). We have done so as well. E.g., Morris v. Woodford, 273 F.3d 826, 840 (9th Cir.2001) (citing fact that jury asked mid-deliberation question as evidence that it was confused by the original instruction); United States v. Frega, 179 F.3d 793 (9th Cir.1999) (stating that a reviewing court may infer from the jury's questions that it was confused about a controlling legal principle). Here, as in those cases, Juror Hern's questions strengthen our conviction that the original and supplemental instructions did not convey to the jury that it could consider Belmontes' nonstatutory mitigating evidence pertaining to his probable future behavior in prison if incarcerated for life.

We need not rely on affirmative evidence of jury confusion in order to reach this conclusion, however. See Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 733 (2002) ("Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion."). "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any indication of perplexity on their part." Id. To hold otherwise would condition our ability to redress serious constitutional violations on such subjective vagaries of fate as whether the jurors happened to ask a question instead of embarking boldly down the wrong path.

makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-13 (1946). In this case, the trial judge had a duty to cure any ambiguity in his instructions by providing a clear description of the jury's obligations. The judge should have answered Juror Hern's questions by instructing the jury that "the listing" of mitigating factors was not exhaustive and that the jury's duty was to consider and weigh all of the mitigating evidence presented by Belmontes during the sentencing phase. Cf. Boyde, 494 U.S. at 383. Instead, however, the judge simply affirmed Juror Hern's incorrect assumptions with a terse, "That is right." In so doing, he not only failed to correct Juror Hern's erroneous view, but he likely left all the jurors with the impression that they could consider mitigation evidence only if it appeared as one of the "certain factors" in "the listing." As we have discussed, Belmontes' principal mitigating evidence does not fall in this category.

The trial judge also instructed the jury that it could not consider a specific subject relating to Belmontes' ability to adjust to prison life. Less than thirty seconds after Juror Hern's inquiry, Juror Hailstone said: "Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The trial judge responded: "That is something you cannot consider in making your decision." He did not explain why the jury could not consider this issue, and immediately after issuing this response, he sent the jury off to resume its deliberations. The instruction not to consider possible future psychiatric treatment was misleading because of the judge's failure to explain to the jury why it could not consider the prohibited subject; to the extent that the jury believed that it could not consider mitigating evidence relating to how Belmontes might behave in a controlled prison environment, the instruction as given would likely have confirmed its misconception.

Juror Hailstone's question and the trial judge's response are troubling because of the likelihood that the jury understood them

in the context of the larger discussion about how to consider, weigh, and balance aggravating and mitigating circumstances.[20] In such case, the jury would have inferred from the trial judge's response that it could not consider Juror Hailstone's question, not because there had been no evidence presented on the subject at trial, but because it raised a consideration that did not relate to one of the "certain factors" set forth in "the listing," or, to put it differently, to one of the factors bearing on the defendant's culpability for the crime. The trial judge's response thus likely reinforced the jury's mistaken notion that Belmontes' mitigation evidence relating to his probable future good conduct if confined in a structured prison environment was irrelevant to the sentencing decision.

The next question is whether the trial judge's various instructions relating to limitations on the evidence that could be considered had an effect on the jury's deliberations. We may not reverse the jury's penalty determination unless the instructions actually created "a reasonable probability that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380 (emphasis added). The jury's decision must stand "if there is only a possibility of such an inhibition." Id. (emphasis added).

We hold that there is a reasonable probability that, as a result of

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20. The government insists that the reason for his answer was obvious: There was no evidence presented on the topic of possible psychiatric treatment at Belmontes' trial; therefore, the jury could not consider it. The government argues that the jurors would have realized that this was why they could not consider Juror Hailstone's question, and so the trial judge's response could have had no effect on their deliberations. We reject this contention. The jurors at Belmontes' trial were not lawyers; they were not schooled in the rules of evidence, and they had no reason to know that the trial judge's response was based on an evidentiary concern (if, in fact, it was based on an evidentiary concern rather than on the trial judge's misunderstanding of the law). It is far more likely that the jury would have viewed this question and its answer in the manner that we have described.

the court's instructions, the jury in Belmontes' case did not consider his principal mitigating evidence. The trial judge began by giving a faulty instruction, one that on its face arguably does not allow consideration of mitigating evidence pertaining to the defendant's probable future good behavior in prison, as opposed to his culpability for the crime. He then rejected a significant part of the supplemental instruction that Belmontes proposed in an effort to solve the problem. The jurors were understandably confused, and they asked questions of the court in an effort to clarify the scope of their duty. In the course of that dialogue, the trial judge endorsed Juror Hern's view of the instructions, a view that strongly suggested that the jury could consider, weigh, and balance only "those certain factors" that appeared in "the listing." Following that endorsement, the trial judge advised the jury without further explanation that, in making its decision, it could not consider the possibility that Belmontes could receive psychiatric treatment in prison. In sum, every instruction that the jury received tended to convey the message that the jury could not consider Belmontes' mitigating evidence unless it related to his culpability for the crime. Under these circumstances, there is, at the least, a reasonable probability that the jury did not consider Belmontes' principal mitigation evidence--the evidence that provided the factual support for his argument in mitigation: that he would live a productive life if permanently incarcerated in a structured environment. Because "[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner," Boyde, 494 U.S. at 377- 78, the unadorned factor (k) instruction, as applied in Belmontes' case, was unconstitutional.

Having concluded that an error of constitutional magnitude infected the penalty phase of Belmontes' trial, we turn finally to the question whether that error was nonetheless harmless. See Boyde, 494 U.S. at 380 (applying Brecht harmless error standard). Belmontes cannot obtain a new trial unless the instructional error had "a substantial and injurious effect" on the jury's verdict. Brecht v. Abrahamson, 507 U.S. at 637. We hold that it did.

Our cases are divided as to whether the petitioner, the state, or neither bears the responsibility for showing harmless error under the Brecht harmless error standard. Compare Rodriguez v. Marshall, 125 F.3d 739, 744 (9th Cir.1997) (placing burden on petitioner), with Keating v. Hood, 191 F.3d 1053, 1062 (9th Cir.1999) (as amended) (placing burden on state), and Thompson v. Borg, 74 F.3d 1571, 1575 (9th Cir.1996) (rejecting burdens of proof in favor of an independent determination of whether a trial error had a substantial and injurious effect). In a recent case, we attempted to clarify the rule, holding that "[t]he Supreme Court has made clear that whether a trial error had a substantial and injurious effect is not to be analyzed in terms of burdens of proof." Mancuso v. Olivarez, 282 F.3d 728, 737 n. 4 (9th Cir.), as amended, 292 F.3d 939 (2002), citing O'Neal v. McAninch, 513 U.S. 432, 436 (1995). In Mancuso, we explained that the reviewing court has "the responsibility to determine this legal question 'without benefit of such aids as presumptions or allocated burdens of proof that expedite factfinding at the trial.' " Id. (quoting O'Neal, 513 U.S. at 437). Nevertheless, we stated that "[I]f one is left in grave doubt [about the harmfulness of the error], the conviction cannot stand." Id. (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)). Because the court was convinced that the constitutional error in that case was neither substantial nor injurious, and because it did not find itself in "grave doubt," it upheld the conviction. Id. at 953, 958.

A subsequent decision of the en banc court affirmed Mancuso's reasoning but went on to address what the court should do when it finds itself in "grave doubt" about the harmlessness of the error.[21] See Payton, 346 F.3d 1204, 2003 WL 22383147, at *9.

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21. Payton characterized the appropriate inquiry as: "Do I, the judge, think that the error substantially influenced the jury's decision?" Id. at *10 (quoting O'Neal, 513 U.S. at 436). It stated that the court should answer this question without reference to presumptions and burdens of proof. Id.

We held:

> If ... we are not fairly assured that there was no effect on the verdict, we must reverse. [O'Neal, 513 U.S. at 437 (quoting Kotteakos v. United States, 328 U.S. 750, 764-65 (1946))]. In the "narrow circumstances" in which we are in "grave doubt" as to the effect of the constitutional error, we must assume that there was such an effect, and grant the petition. O'Neal, 513 U.S. at 436, 438; see also Thompson, 74 F.3d at 1575.
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> In the course of this inquiry, it is the State that bears the "risk of doubt." O'Neal, 513 at 438; Valerio v. Crawford, 306 F.3d 742, 746 (9th Cir.2002)(en banc), cert. denied, 123 S.Ct. 1788 (2003). We look to the State to instill in us a "fair assurance" that there was no effect on the verdict. See Morales v. Woodford, 336 F.3d 1136, 1148 (9th Cir.2003) ("[T]he state must provide us with a 'fair assurance' that the error was harmless under Brecht."); Valerio, 306 F.3d at 762; see also O'Neal, 513 U.S. at 443 ("[T]he State normally bears responsibility for the error that infected the initial trial."). Only if the State has persuaded us that there was no substantial or injurious effect on the verdict do we find the error harmless.

Id. at *10; see also id. (examining Supreme Court precedent and concluding that "[t]his framework is faithful to the balance the Supreme Court has struck between concerns of federal-state comity and finality in state criminal trials, and the irreversible harm caused by an execution resulting from an unconstitutional error"). Because we found ourselves in "grave doubt" about the effect of the instructional error in that case, we held that the error was not harmless, and we granted the writ with respect to the penalty phase. Id. at *9-10.

Here we need not consider whether the state, the defendant, or neither party bears the burden of proof, or whether to follow the approach set forth in the vacated en banc opinion. We do not find

ourselves in "grave doubt." The issue of burdens is irrelevant to this case. No matter who has the burden, or if there is no burden at all, we are convinced that the instructional error in this case, which prevented the jury from considering and giving effect to Belmontes' most important mitigation evidence, had a substantial and injurious effect on the jury's verdict. At the penalty phase of this trial the aggravating evidence was not strong. It basically consisted of the fact that Belmontes was previously incarcerated in the youth facility for being an accessory after the fact to voluntary manslaughter, one domestic violence incident, and two occurrences relating to possession, or possible possession, of a gun. The prosecutor candidly told the jury that there was not a lot in the way of aggravating evidence. He asked the jury to return a death sentence because of the circumstances of the crime itself. Yet the crime, though shocking and deplorable, was in essence a robbery gone wrong. The murder was not pre-planned, nor did it involve kidnapping, rape, torture, multiple victims, or any of the other especially heinous elements that usually are present when a jury votes for the ultimate penalty. In short, the McConnell murder was of the kind that generally does not result in a death penalty.[22/]

Under these circumstances, there is a reasonable probability that a properly instructed jury would have spared Belmontes' life had it believed that he would not pose a future danger if sentenced to life without parole, and that instead he would become a model prisoner who could contribute something of value to society. The

state concedes that Belmontes presented "substantial" evidence in support of this mitigation theme. Several witnesses, including Belmontes himself, testified that although he had difficulty in

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22. On this point, Belmontes submitted evidence that, of the thirty defendants who were tried for felony-murder in San Joaquin County between 1977 and 1986, only two, including Belmontes himself, received a death sentence. Many defendants whose crimes by any measure were substantially more aggravated than Belmontes' did not receive a death penalty.

acting appropriately in the outside world, he thrived in the structured, institutional environment of prison. Belmontes described his experience on the CYA's fire crew, during which he rose from last man to number two, a position of leadership and responsibility, and about his gradually increasing involvement in Christianity during his prior incarceration. Reverend Barrett spoke about Belmontes' participation in the M 2 Christian sponsorship program, which he felt was genuine, and testified that in his opinion if granted a life sentence Belmontes would make positive contributions to prison life through his involvement with the prison ministries. One of Belmontes' most important witnesses was Reverend Miller, who testified that Belmontes had been good at counseling young inmates not to repeat the mistakes that he had made and that he "definitely would be used in the prison system for this kind of activity" if granted life without parole.

The importance of this mitigation theme was stressed during closing arguments. In his allocution, Belmontes took responsibility for his actions and stated that he did not want to use his difficult childhood as an excuse. He asked the jury to give him the opportunity to rehabilitate himself, set goals, and make a positive contribution to the welfare of others while in prison. His counsel repeated this theme in his emotional closing argument, in which he asked the jury to spare Belmontes' life on the ground that he would make positive contributions if allowed to live out his natural life in prison.

Given the weakness of the aggravating evidence and the substantial nature of the mitigating evidence, we conclude that had the jury been properly instructed, and had it understood that it could consider and give effect to the evidence regarding Belmontes' ability to function effectively in a prison setting, there is a reasonable probability that it would have returned a different verdict. Accordingly, Belmontes is entitled to relief on the sentencing phase.

CONCLUSION

Although we are disturbed by the prosecution's failure to disclose impeaching evidence and to correct false testimony on the part of its principal witness, as well as by defense counsel's failure to disclose the extent of his prior representation of Vasquez and to pursue a full investigation of Vasquez's background, and although we are at least as disturbed by the results of the study that showed the discriminatory racial effect of the County's capital charging policies, we cannot conclude, for the reasons we have explained, that any of these occurrences served to violate Belmontes' constitutional rights. Thus, we are compelled to deny relief with respect to the guilt phase, including the special circumstances finding. However, because the trial judge failed to instruct the jury that it was required to consider Belmontes' principal mitigation evidence, and because we conclude that this failure had a substantial and injurious effect upon the verdict, we reverse with respect to the sentencing phase. We remand to the district court with instructions to issue an appropriate writ vacating Belmontes' death sentence.

AFFIRMED in part, REVERSED in part, and REMANDED for issuance of the writ in accordance with this opinion.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

The court properly affirms Judge Levi's determination that there was no constitutional error in Belmontes's convictions for first degree murder with special circumstances in state court. I am pleased to concur in its conclusions as to the guilt phase. Regrettably, as to the penalty phase, the majority strains mightily--and unpersuasively--to perceive constitutional error in the compre-hensive and perfectly proper jury instructions given by the state trial judge. Because there simply is no such error,

and the Supreme Court has expressly told us so, I must respectfully dissent from the court's reversal of the district court's denial of the petition for the writ with respect to the penalty phase.

Just over a decade ago, the Supreme Court in Boyde v. California, 494 U.S. 370 (1990), interpreted the same jury instruction at issue today, "factor (k)," and concluded that it was constitutionally sound. The Court held that there was no "reasonable likelihood that the jury ... applied [factor (k)] in a way that prevent[ed] the consideration of constitutionally relevant evidence." Id. at 380. Nonetheless, the majority manages to distinguish Boyde, and makes the extraordinary conclusion that there was a reasonable likelihood that the jury refused to consider mitigating evidence that both the prosecution and the defense acknowledged was properly before it. Because the jurors were not constitutionally barred from making a death penalty determination in this case, I would affirm.

I

At the close of the penalty phase, the state trial court judge began instructing the jury on aggravating and mitigating circumstances as follows: "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." The court then read an enumerated list of seven factors, exhaustive with respect to aggravating circumstances, but only examples with respect to mitigating circumstances. The last of these factors, factor (k), instructs the jury to consider, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The majority, by misconstruing both Supreme Court precedent and the evidence in this case, concludes that the factor (k) instruction failed to provide an outlet for the jury to consider some of Belmontes's penalty phase evidence.

A

The majority's holding is based on the false premise that factor (k) limits the jury's consideration only to circumstances that might excuse the crime. See supra, at 897. But the Court has already explicitly rejected this proposition. In Boyde, the Court held that factor (k) did not "limit the jury's consideration to 'any other circumstances of the crime which extenuates the gravity of the crime.' [It directed the jury] to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." 494 U.S. at 382 (emphases in original); see also id. at 381 (holding that there was "no[ ] ... reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character."). Boyde makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k).

Belmontes's penalty phase presentation was entirely composed of such evidence. The witnesses who testified on his behalf spoke to his religious convictions and his behavior while a ward of the California Youth Authority ("CYA")--all of which goes to his background and character before he murdered Steacy. While the majority attempts to paint such evidence as showing that he would be a model inmate if sentenced to life in prison, the testimony as actually presented deals exclusively with his character prior to the crime. In fact, not one witness who testified during the penalty phase testified to Belmontes's behavior after the murder.

By deftly labeling such testimony as "post-crime" mitigation evidence, the majority attempts to fit within the scope of Payton v. Woodford, 299 F.3d 815, 824-25 (9th Cir.2002) (en banc), vacated on other grounds by 123 S.Ct. 1785 (2003), on remand at 346 F.3d 1204, 2003 WL 22383147 (9th Cir. Oct.20, 2003) (en banc). Such attempt cannot work because Payton involved actual post-crime evidence--Payton's conversion to Christianity

following his crime. Here, all of the evidence related to Belmontes's character before he committed his crime. Belmontes's religious conversion and ability to conform to prison are exactly the types of evidence which the Supreme Court held fit within the plain language of factor (k). See Boyde, 494 U.S. at 382 (holding that Boyde's strength of character in the face of adversity was considered evidence which "excused" the gravity of the crime under factor (k)). Accordingly, under Boyde, the jury was able to consider and to give effect to all of Belmontes's mitigating evidence. Nothing more was constitutionally required. Johnson v. Texas, 509 U.S. 350, 372-73 (1993) (holding that "a jury [need not] be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.").

Even so, the Supreme Court has held that inquiry into future dangerousness of a defendant "is not independent of an assessment of personal culpability." Id. at 369. In Johnson, the Court held that an instruction which asked jurors to consider the future dangerousness of a defendant provided ample opportunity for the jury to consider the defendant's youth as mitigating evidence. Id. at 369-70. Even though the statutory factor did not explicitly provide that the jury could consider the defendant's youth as a mitigating factor for culpability of the crime, the Court concluded that there was no reasonable likelihood that the jury would have thought it was foreclosed from considering it. Id. at 370.

Likewise, because factor (k) allows the jury to consider Belmontes's character and background, there is no reason to think that the jury would have thought it was foreclosed from using such information to consider his future potential if sentenced to life in prison. As the Supreme Court has noted, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." Skipper, 476 U.S. at 5 (emphasis added); see Boyde, 494 U.S. at 382 ("Petitioner had an opportunity through factor (k) to argue that his background

and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death."); cf. Johnson, 509 U.S. at 370.

Thus, while the majority scours the cold record decades after the trial to find an ambiguity in the sentencing instruction, it is highly doubtful that the jury itself would have so found. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." Boyde, 494 U.S. at 380-81. I see no reason why the jury would have resisted the inevitable consideration of Belmontes's future potential in light of the character evidence presented.

B

The majority also ignores the Supreme Court's advice that "[d]ifferences in interpretation may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at the trial likely to prevail over technical hairsplitting." Boyde, 494 U.S. at 380-81. That factor (k) permits the consideration of Belmontes's character evidence is amplified when the penalty phase is viewed as a whole, particularly in light of the arguments made by counsel.

Like the instruction given in Boyde, the jury in this case was told that it must consider all the evidence unless otherwise instructed. Boyde, 494 U.S. at 383 (relying in part on the fact that Boyde's jury was instructed that it "shall consider all of the evidence which has been received during any part of the case" (emphasis in original)). Although it is undisputed here that neither the court

nor the parties told the jury that it could not consider any of the evidence presented by Belmontes, the majority infers ambiguity.

In this case, the jury heard, without objection, evidence regarding

Belmontes's behavior in prison before the murder: how he had found God and how he could serve as an example to other inmates. In its closing argument, the prosecution stated, "I suspect you will be told ... that the defendant's religious experience is within that catchall [factor (k)] that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime. I'm not really sure it fits in there. I'm not sure it really fits in any of them." Even so, the prosecutor noted, "But I think it [Belmontes's religious experience] appears to be a proper subject of consideration."

Later the prosecutor expounded on why the jury should consider Belmontes's evidence:

> I suppose you can say it would be appropriate [to consider such evidence] because--in this fashion: The defendant may be of value to the community later. You recall the people talking about how he would have the opportunity to work with other prisoners in prison. And I think that value to the community is something that you have to weigh in. There's something to that.

Belmontes's pleas were similar. Belmontes asked for life in prison because in prison "there is an opportunity to achieve goals and try to better yourself." His counsel continued the argument, asking the jury to spare Belmontes's life because he would make a positive contribution if his life were spared: "[W]hat I am suggesting to you and what I hope the evidence suggests to you is Fernando Belmontes cannot make it on the outside. I think it is pretty clear from the development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own." He added,

> The people who came in here told you about him. They told you not only what they know of him, but they gave you, as best they could, under the very difficult circumstances of somebody looking at the rest of their life in prison, a game plan, something he can do with his life, something he's been

> able to do. We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, to contribute something in whatever way he can.

At no time did the prosecutor object to the defense's characterization, nor did the trial judge indicate that the parties' statements of law were not correct or that the jury could not consider any of the evidence. Nevertheless, the majority concludes that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes's lawyer were not smart enough to realize they were all mistaken. In its world, the majority envisions a jury playing a game of "gotcha" with the lawyers, whereby the jury ignores everyone and applies its own instructions.

Such a conclusion is pure fantasy and cannot justify overturning the jury's choice here. Compare Buchanan v. Angelone, 522 U.S. 269, 278-79 (1998) ("The parties in effect agreed that there was substantial mitigating evidence and that the jury had to weigh that evidence against petitioner's conduct in making a discretionary decision on the appropriate penalty. In this context, 'there is not a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner.' "), with Payton v. Woodford, 346 F.3d 1204, 2003 WL 22383147, at *9 (holding that prosecutor's argument that factor (k) did not allow the jury to consider evidence of a post-crime religious conversion and trial court's failure to correct the argument with proper jury instructions meant that "there was a reasonable likelihood that ... the jury did not consider and give effect to post-crime mitigating evidence").

II

Even assuming, arguendo, that there was a reasonable likelihood that the jury could have interpreted factor (k) to prohibit

consideration of Belmontes's character witnesses, the instructions were still constitutionally sufficient. To arrive at its result, the majority downplays the trial court's initial instruction, in which the jury was told, "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." (emphasis added). Such a jury instruction alone is constitutionally sufficient to convey to the jury its duty to consider all mitigating evidence. See Buchanan, 522 U.S. at 276 (holding that there was no likelihood of confusion when the jury had to indicate on the statutory verdict form that it had "considered the evidence in mitigation of the offense," and the trial court provided the following mitigation instruction: "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment"); Johnson, 509 U.S. at 368 (holding that jury instruction that stated the jury could consider all the mitigating evidence presented during both the guilt and penalty stage was sufficient to inform the jury that it could consider evidence of defendant's youth); Blystone v. Pennsylvania, 494 U.S. 299, 307-08 (1990) ("In petitioner's case the jury was specifically instructed to consider, as mitigating evidence, any 'matter concerning the character or record of the defendant, or the circumstances of his offense.' This was sufficient to satisfy the dictates of the Eighth Amendment." (citation to the record omitted)); cf. Tuilaepa v. California, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.").

The trial court's duty is simply to convey to the jury that all mitigating evidence must be considered and may be given effect when it deliberates on a defendant's capital sentence. Buchanan, 522 U.S. at 276. The absence of any specific instruction to the jury to consider the defendant's ability to adjust to an institutional setting is utterly irrelevant. Id. at 277 ("By directing the jury to base its decision on 'all the evidence,' the instruction afforded jurors an opportunity to consider mitigating evidence.").

Even if the jury were confused by the subsequent enumeration of individual factors--perhaps thinking that its consideration of mitigating evidence was limited to such factors--the confusion would have been short lived. After reading the enumerated factors, the court instructed, "[T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." The majority, however, fixates, not on the clear language of such directive, but on the two sentences which directly follow: "You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case." According to the majority, these sentences somehow obfuscate the clarity of the court's instructions.

We must look at these instructions in their entirety, however. The judge instructed,

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

When these instructions are read in context, there is little doubt that the court conveyed the message that the enumerated factors were not the exclusive mitigating circumstances that the jury could consider. The court first instructed the jury how to apply the aggravating circumstances, specifically that it could not consider any non-enumerated factors. The court then contrasted consideration of aggravating factors with mitigating factors, which it noted were merely "examples of some of the factors" that the jury could consider. The fact that the court further instructed that the jury should consider each of the mitigating factors (recall that "factors" refers to all mitigating circumstances and not, as the majority implies, to the enumerated circumstances read by the judge) as any one alone might support life in prison, was unlikely to confuse the jury, when viewed in totality.

The trial court's additional instruction reinforced the constitutional requirement of conveying to the jury that it is "not precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Buchanan, 522 U.S. at 276 (citations omitted). Instead of confusing the jury, the trial court's instructions made it clear that all evidence that was presented must be considered. Moreover, the instruction which the majority concludes was "critical," supra, at 902, substantively adds nothing. Rather than speculating that the jury was too dim to understand what it was told by the court, we must presume that the jury understood the instructions taken as a whole. Weeks, 528 U.S. at 234.

III

According to the majority, however, it is the series of questions between individual jurors and the judge that proves the jury's confusion. After the jury deliberated for several hours, it sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The judge refused to tell the jury what would happen if they could not agree, but told them that it would discharge them if they could not reach an agreement. He then asked, "Do you think if I allow

you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?"

At this time, individual jurors asked the judge some questions.

> JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?
>
> THE COURT: That was the listing, yes, ma'am.
>
> JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> THE COURT: That is right. It is a balancing process.
>
> ...
>
> JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?
>
> THE COURT: That is something you cannot consider in making your decision.

In the majority's view, Juror Hern's use of the term "listing," and the judge's failure to note that the "listing" was not exclusive as to mitigating circumstances, shows that individual jurors were confused by the instruction. I respectfully disagree. The jury did not submit a formal question to the judge to indicate that it was confused as to its duties or the instructions, and no informal follow-up questions were asked by any jurors. And while the answers the judge gave the juror might have been cryptic, they were not incorrect. Cf. Bollenbach v. United States, 326 U.S. 607, 613 (1946).

Most importantly, just before the judge answered these informal questions, he asked the jury "to go over the instructions again."

Under existing Supreme Court authority, any confusion with regard to its responsibilities would have been cleared up with another such review. See Weeks v. Angelone, 528 U.S. 225, 733-34 (2000) (holding that no likelihood of confusion existed when the trial judge referred back to his original instruction when the jury asked a question regarding the instructions themselves). And if, after reviewing the instructions once again, jurors were still confused about the evidence they could consider, they likely would have asked for a formal clarification. See id. at 734 (noting that jury did not submit follow-up question after judge referred it back to the original instructions). While it is possible that after reviewing the instructions again, confusion might have arisen, it was certainly not reasonably likely. See Boyde, 494 U.S. 370.

Incredulously, the majority also takes issue with Juror Hailstone's question regarding whether Belmontes could receive psychiatric treatment while in prison. The court properly instructed the jury that it could not consider such potentially mitigating evidence. And for good reason: no such evidence was ever introduced at any stage of the trial. Indeed, the jury was prohibited from such considerations. See Hughes v. Borg, 898 F.2d 695, 700 (9th Cir.1990) ("State defendants have a federal constitutional right to an impartial jury and jurors have a correlative duty to consider only the evidence that is presented in open court."); see also TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) ("Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, a jury is bound to consider only the evidence presented to it in arriving at a judgment.").

There was absolutely nothing wrong with the trial judge's instruction that the jury could not consider evidence that was not presented; indeed, it would have been unconstitutional for him to have said otherwise. Yet, the majority ignores such niceties. If the jury were truly confused by the judge's answer, surely it

would have asked a follow-up question of some sort. Nonetheless, without any basis in the record, the majority concludes that the judge's perfectly proper statement was likely to confuse.

IV

The majority concludes that the jurors listened to all the evidence regarding Belmontes's character, listened to the prosecution and the defense tell it to consider such evidence, and listened to the trial court tell it that it must consider all the evidence presented; yet the majority holds that the jury was confused about whether it could consider the evidence presented. Such conclusion, with all due respect, is simply beyond belief; such holding turns the entire proceeding "into a virtual charade." Boyde, 494 U.S. at 383 (citation and quote marks omitted).

The jury, in reality, returned a death sentence for Belmontes, not because of a confusing jury instruction, but because he murdered nineteen-year-old Steacy McConnell in cold blood, striking her 15-20 times in the head with an iron dumbbell he had brought with him to her house in case of such an encounter; I sincerely doubt the family and friends of Steacy would share the majority's callous view that her murder was not "especially heinous."

Not surprisingly, the prosecution was able to portray Belmontes as a violent young man by focusing on his past behavior: his armed theft of a loaded handgun, his tendency to carry such a weapon, his fight with another ward while in the CYA after pleading guilty to being an accessory after the fact to voluntary manslaughter, and his battery of his pregnant girlfriend, which caused her to drop their two-year-old daughter. It is such violent, anti- social behavior, not an ambiguous jury instruction, that placed him in the situation he now finds himself.

Perhaps the jury simply did not believe that a convicted murderer might be a particularly good role model to other inmates, despite Reverend Miller's testimony that Belmontes would be good at

counseling other inmates not to repeat his "mistakes." After all, Steacy's murder was hardly a "mistake." Perhaps Belmontes's jailhouse conversion to Christianity, which mysteriously lapsed as soon as he returned to society, and his ascent to the top of CYA's fire crew, could rightly have been seen as manipulative ploys to gain early release for his previous crimes.

By concluding that the trial court's jury instructions were unconstitutional, the majority ignores the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." Boyde, 494 U.S. at 380. There is nothing in the record which would lead me to believe that there was a reasonable probability that the jury was confused about its sentencing duties; therefore I would affirm the denial of the petition for the writ as to the penalty phase. I must respectfully dissent from the majority's refusal to do so.[1]

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1. Belmontes also contends that he was deprived of constitutionally effective counsel during the penalty stage of his trial. His claim is without merit. See Strickland v. Washington, 466 U.S. 668, 694 (1984); Gerlaugh v. Stewart, 129 F.3d 1027, 1035-36 (9th Cir.1997).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, pr, Petitioner-Appellant,	)	No. 01-99018.
	)	D.C. No.
v.	)	CV-89-00736-DFL
	)	Eastern District
JEANNE S. WOODFORD, Warden, for the California State Prison at San Quentin, Respondent-Appellee.	)	of California, Sacramento
	)	ORDER

Filed February 5, 2004

Before: Stephen Reinhardt, Diarmuid F. O'Scannlain, and Richard A. Paez, Circuit Judges

ORDER;
Dissent by Judge Callahan;
Dissent by Judge Bea

ORDER

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge O'Scannlain would grant the petition for panel rehearing and the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter

en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is denied.

CALLAHAN, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, TROTT, KLEINFELD, GOULD, TALLMAN, BYBEE and BEA join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc.

In 1982, a jury found Fernando Belmontes guilty of first-degree murder for beating a nineteen-year-old woman to death with a dumbbell bar and sentenced him to death.[1] On automatic appeal to the California Supreme Court, Belmontes argued, inter alia, that the trial court misinstructed the jury on the proper role of sympathy and general character and back-ground evidence during the trial's penalty phase. *See People v. Belmontes* ("*Belmontes I*"), 45 Cal.3d 744, 799, 248 Cal.Rptr. 126, 755 P.2d 310 (1988), cert. denied, 488 U.S. 1034, 109 S.Ct. 848, 102 L.Ed.2d 980 (1989). The supreme court, properly viewing the jury instructions and arguments as a whole, concluded that "no legitimate basis" existed for believing that the trial court had misled the jury. *Id.* at 802.

Now, twenty-one years after Belmontes' trial and fifteen years after the California Supreme Court's ruling, the panel's decision reverses Belmontes' sentence. In doing so, the panel majority concludes that the trial court had, in fact, misinstructed the jury regarding its sentencing responsibilities. *Belmontes II*, 350 F.3d at 908. This conclusion is in error for three reasons. First, the

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1. Specifically, the jury convicted Belmontes of first-degree murder with special circumstances. It made special findings that Belmontes was the actual killer and that he had the specific intent that death occur. *Belmontes v. Woodford* ("*Belmontes II*"), 350 F.3d 861, 873 (9th Cir. 2003).

panel's conclusion defies the record and clear Supreme Court precedent. Second, as Judge O'Scannlain notes in his dissent, the panel's conclusion undermines the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Belmontes II*, 350 F.3d at 915(citing *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). Third, the panel reaches its conclusion despite the California Supreme Court's unanimous conclusion that "no legitimate basis" existed for believing that the trial court misled Belmontes' jury about its sentencing responsibilities. *Belmontes I*, 45 Cal.3d at 802.

I

Under the Eighth Amendment, a jury must consider all relevant mitigating evidence that a defendant presents to it and afford that evidence such weight as it deems appropriate. *Penry v. Johnson*, 532 U.S. 782, 797 (2001). Simply allowing a defendant to present mitigating evidence to the jury is not enough. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). A jury must be able to consider, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). Such mitigating considerations include looking at a defendant's past behavior and drawing favorable inferences about his probable future conduct. *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986).

Belmontes argues, and the panel agrees, that the trial judge erred in this regard by not advising the jury to consider the portion of his mitigating evidence that tended to show that he would adapt well to prison and would become a constructive member of society if granted a life sentence. In order for Belmontes to prevail on this argument, "a reasonable likelihood" must exist that the jury understood the court's instructions in a way that caused it not to consider this constitutionally relevant evidence. *Boyde*, 494 U.S. at 380. Contrary to the panel's decision, no such reasonable likelihood exists.

A

The trial judge began instructing the jury by stating that "it shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." The judge then read an enumerated list of seven mitigating circumstances. The last circumstance, the so-called "factor (k)," instructed the jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

The Supreme Court has interpreted factor (k) as specifically directing a jury "to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character."[2/] *Boyde*, 494 U.S. at 3820; *see also Buchanan*, 522 U.S. at 277 (concluding that, by directing the jurors to base their decision on "all the evidence," that the instruction properly allowed the jurors to consider any mitigating evidence). The panel, however, concludes that these instructions,

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2. Our recent decision in *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) (en banc), does nothing to change this conclusion. Factor (k) was ambiguous under the specific facts of *Payton*. We reached that conclusion only by carefully distinguishing *Boyde*. *See Payton*, 346 F.3d at 1211-12.

We distinguished *Boyde* on two ground. First, *Payton* concerned "*post*-crime" mitigating evidence. *Boyde* (not to mention *Belmontes II*) concered "*pre*-crime" evidence. Second, the prosecutor in *Payton* "repeatedly stated to the jury that factor (k) did *not* encompass Payton's mitigating evidence of his religious conversion and good behavior in prison." *Id.* at 1212. The prosecutor in *Boyde* never suggested to the jury that it could not consider mitigating evidence of character and background. *See Boyde*, 494 U.S. at 385. Now in *Belmontes II*, the prosecutor *explicitly told the jury* that it should consider Belmontes' religious experience, his future value to the community and his ability to work with other prisoners when determining his sentence.

Thus, for the very reasons that *Boyde* did not control *Payton*, *Payton* does not now control *Belmontes*. Holding otherwise ignores our own *en banc* description of Supreme Court precedent. This misapplication highlights the danger and implications of the panel's decision.

by their plain language, do not encompass events or considerations unrelated to Belmontes' culpability, particularly forward-looking considerations such as Belmontes' future conduct if sentenced to life in prison. *Belmontes II*, 350 F.3d at 901. This conclusion is wrong.

As just noted, the Supreme Court has told us that factor (k) instructs the jury to consider a defendant's background and character. *Boyde*, 494 U.S. at 382. The Court has further noted that a jury's consideration of "a defendant's past conduct as indicative of his probable future behavior is an *inevitable* and not undesirable element of criminal sentencing." *Skipper*, 476 U.S. at 5 (emphasis added). If any doubt remained, the judge here further clarified the sentencing instructions and factor (k) by informing the jury that "the mitigating circumstances which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." *Belmontes II*, 350 F.3d at 897 (emphasis added).

The panel contends that the trial judge effectively undid any clarity that Belmontes' jury instructions had achieved by giving a "superceding qualifying directive." *Id.* at 902. Specifically, the panel points to the judge's following instructions: "You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case." According to the panel, a juror who followed these instructions would think that he or she could not consider nonstatutory mitigating evidence, namely, that the juror could not consider testimony tending to show that Belmontes would lead a constructive life in prison. *Id.* The panel thus suggests that the last two sentences of the jury instructions caused the jury to completely ignore the preceding sentences. This interpretation defies logic.

Nothing in the jury instructions was contradictory. The judge

enumerated seven mitigating *circumstances*. He told the jury that those enumerated *circumstances* were "examples of some of the factors " that the jury should consider. The judge told the jury that he had given them examples of factors-- examples to which the jury should pay careful attention and examples that, standing alone, could support a decision that death is not appropriate. Nowhere did the judge limit the jury to considering only the enumerated mitigating circumstances. Rather, he told them just the opposite.

We presume that a jury follows its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). We therefore must presume that the jury knew that the enumerated circumstances were "examples" of mitigating factors. The surrounding record further supports this presumption.

B

Even assuming, *arguendo*, that one might consider the court's jury instructions to be ambiguous, the jury did not reach its verdict in a vacuum. For this reason, we look to the mitigating evidence introduced into the record to discern what evidence the jury considered when faced with the allegedly ambiguous instructions. *Boyde*, 494 U.S. at 384 (stating that "the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous."). Here, the panel's own interpretation of the record suggests that the jury must have considered Belmontes' future potential as a life prisoner.

As the panel states, Belmontes put on "substantial" evidence that he could become a model prisoner and would not pose a future danger. *Belmontes II*, 350 F.3d at 907. Belmontes personally addressed the jury, asking the jurors to spare his life and to give him "an opportunity to achieve goals and try to better [him]self." *Id.* at 876 (alteration in original). In an "emotional closing argument," Belmontes' defense counsel "asked the jury to spare Belmontes' life on the ground that he would make

positive contributions if allowed to live out his natural life in prison." *Id.* at 907. It is hard to imagine that the defense could have presented the issue of life or death more poignantly. Perhaps most telling, however, the *prosecution* told the jury that it should consider Belmontes' religious experience, his future value to the community and his ability to work with other prisoners when determining his sentence. See *id.* at 910-11 (O'Scannlain, J., dissenting).

Thus, at least four aspects of the penalty phase indicate that the jury considered forward-looking evidence of Belmontes' future: (1) the "substantial" evidence regarding Belmontes' character, (2) Belmontes' personal plea for the jury to allow him to improve himself, (3) the defense *and* prosecution's directions to consider the forward-looking evidence and (4) the court's instruction to consider all evidence presented. The panel nevertheless concludes that the jury was confused about whether it should consider the evidence presented. As Judge O'Scannlain points out, this conclusion turns the entire proceeding "into a virtual charade." *Id.* at 914-15 (citing *Boyde*, 494 U.S. at 383).

C

The panel also concludes that a series of questions between individual jurors and the judge during deliberations proves that the jurors were confused. This interpretation reads far more into the exchange than existed.

After the jury had deliberated for several hours, Juror Hern asked the judge, "[t]he statement about the aggravation and mitigation of the circumstances, now, that was the listing?" The court responded, "[t]hat was the listing, yes, ma'am." She then asked, "[o]f those certain factors we were to decide one or the other and then balance the sheet?" The court answered: "[t]hat is right. It is a balancing process." Shortly thereafter, Juror Hailstone asked whether it was "possible that [Belmontes] could have psychiatric treatment during this time?" The judge

responded: "That is something that you cannot consider in making your decision."

The panel does not contend that the judge's answers were wrong. Rather, the panel concludes from this limited exchange that it is "clear that at least one juror believed that the jury should consider ... only 'those certain factors' that appeared in 'the listing.' " *Belmontes II*, 350 F.3d at 903. With all due respect to the panel, I read the judge and jury's colloquy far differently.

Juror Hern asked whether the jury should consider the "statement about the aggravation and mitigation of the circumstances." Notably, that "statement" explicitly told the jurors that the mitigating factors were nonexclusive. The judge correctly answered "yes." Juror Hern then asked if she should balance those factors. The judge again correctly answered in the affirmative. Juror Hailstone finally asked if Belmontes could have psychiatric treatment. The judge responded, once again correctly, that the jury cannot consider such testimony. *See Hughes v. Borg*, 898 F.2d 695, 700(9th Cir.1990) (noting that jurors can consider only evidence presented at trial).

Jurors are permitted under law to ask questions; the mere asking of questions, however, does not establish juror confusion. In fact, these questions just as easily show that the jury was taking its duty seriously before reaching a verdict. Appellate courts should not speculate why a juror asked a particular question.

Even if we assume, for the sake of argument, that the jurors were confused when they asked their questions, we must also presume that the jury understood the judge's answers. *See Weeks*, 528 U.S. at 234. Furthermore, even if the jurors remained confused after their discussion with the judge, he instructed the jury "to go over the instructions again." The jury returned to deliberations and did not return with further questions. "Had the jury desired further information, they might, and probably would, have signified their desire to the Court. The utmost willingness

was manifested to gratify them, and it may fairly be presumed that they had nothing farther to ask." *Armstrong v. Toler*, 11 Wheat. 258, 279 (1826). To presume otherwise "would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer." *Weeks*, 528 U.S. at 234.

The panel takes a few isolated incidents and amplifies them into a constitutional infirmity. This ignores the Supreme Court's observation that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. To the extent that jurors have different interpretations of the instructions, these differences "may be thrashed out in the deliberative process, with common-sense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Id.* at 381. Unfortunately, technical hairsplitting and subtle parsing of the instructions is exactly how the panel reaches its conclusion.

II

This is not the first time that courts have had occasion to examine whether Belmontes' jury was confused about its duty to consider all mitigating evidence. More than fifteen years ago, Belmontes argued to the California Supreme Court that the trial court had misinstructed the jury on the proper role of sympathy and general character and background evidence in the penalty phase. As Judge O'Scannlain notes in his dissent, Belmontes presented only character and background evidence to the jury. *Belmontes II*, 350 F.3d at 909. Belmontes' character and background thus provided the only possible basis for the jury to conclude that Belmontes could still be a productive member of society. The California Supreme Court concluded that the jury had understood its duty to consider such evidence.

In reaching its decision, the state supreme court noted that the judge had instructed the jury that "the mitigating circumstances

which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes." *Belmontes I*, 45 Cal.3d at 801 (emphasis in original). The court then noted that "[t]he prosecutor's argument reinforces our conclusion that, as instructed, the jury must have fully understood its obligation to weigh all of the defendant's mitigating evidence." *Id.* While the California Supreme Court did not examine the specific question of whether the jury considered Belmontes' potential to adapt to prison and become a constructive member of society, it did examine the broader question of whether the jury had considered Belmontes' character and background. From this examination, the California Supreme Court concluded that "no legitimate basis" existed for finding that the jury did not understand its obligations.[3] *Id.* at 802. Now, fifteen years later, the panel reexamines whether the jury considered all of the constitutionally relevant mitigating evidence.

The California Supreme Court not only reached a considered conclusion, but it had the benefit of a record that was fifteen years younger. As a federal habeas court, we "should, of course, give great weight to the considered conclusions of a coequal state judiciary." *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The panel instead "strains mightily--and unpersuasively--to perceive constitutional error in the comprehensive and perfectly proper jury instructions given by the state trial judge." *Belmontes II*, 350 F.3d at 908 (O'Scannlain, J., dissenting).

III

The panel labels Belmontes' crime as not "especially heinous." In doing so, it theorizes that, given the allegedly innocuous nature of the crime, the jury would not have sentenced Belmontes to death had it understood its duties. The panel's

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3. Notably, the district court also concluded that the jury had considered all mitigating factors. The present appeal is from this decision.

characterization of the murder greatly distorts the record.

Belmontes struck nineteen-year-old Steacy McConnell fifteen to twenty times in the head with an iron dumbbell bar, a bar that he brought with him to her house. An expert testified that the blows would have sounded "like a cracked pot." Steacy also suffered defensive injuries to her arms, legs and feet; she apparently attempted to ward off this brutal attack, but to no avail. After delivering these fatal blows, Belmontes still had the wherewithal to take Steacy's stereo equipment and explain to his accomplices simply that he "had to take out a witness." *Belmontes II*, 350 F.3d at 870. Later that day, Belmontes sold Steacy's stereo for $100 and bought some beer.

Meanwhile, Steacy's parents found their daughter lying unconscious in a pool of blood. She died shortly afterward from cerebral hemorrhaging caused by the blows to her head. This was not a simple "robbery gone wrong."

The record also presents a decidedly mixed picture of Belmontes' character and background, on which the panel relies so heavily. The jury heard testimony that Belmontes "thrived in the structured, institutional environment of prison." *Id.* at 907. They also heard that Belmontes attempted to swing a chair at another ward while he was in the structured, institutional environment of the California Youth Authority. *Id.* at 873. The jury heard that Belmontes had been "good at counseling young inmates not to repeat the mistakes that he had made." *Id.* at 907. They also heard that Belmontes pleaded guilty to being an accessory after the fact to voluntary manslaughter and that he had battered and attempted to choke his pregnant girlfriend, causing her to drop their infant daughter. *Id.* at 873.

Belmontes may have achieved occasional, moderate success in prison. The record also provided, however, ample aggravating evidence for the jury to sentence him to death. Belmontes did, after all, savagely beat an unarmed nineteen-year-old woman with a dumbbell bar and leave her to die.

IV

Capital cases are always difficult. Our system of justice asks jurors to perform the most difficult tasks imaginable: to resolve credibility, to determine guilt or innocence, and to decide between life and death. Jurors perform these duties viewing the evidence and the defendant firsthand.

This court should not now undo the deliberative process by second-guessing a decision that was squarely within the jury's province. The panel, unfortunately, does just that. It dissects a twenty-one-year-old record to second-guess the jury's decision. In doing so, it finds a "reasonable likelihood" of error where a state supreme court and a United States district court found none. It finds error by misinterpreting United States Supreme Court precedent that demands a different result. It finds error in a way that undermines finality in criminal cases by ignoring the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, 494 U.S. at 380. Simply put, the panel finds constitutional error where none exists.

For these reasons, I dissent.

BEA, Circuit Judge, with whom Circuit Judge TALLMAN joins, dissenting from denial of rehearing en banc:

I join Judge Callahan in her dissent from the denial of rehearing *en banc*. Additionally, I also respectfully dissent from the order denying rehearing en banc with the following comments:

First, the majority errs in finding that the trial court did not properly ***characterize*** Belmontes' evidence as "mitigating."

> The trial judge refused to read the most important part of the requested instruction, which stated: '[Y]ou should not

limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence.' The jury was not informed that it should consider mitigating evidence bearing on Belmontes' probable future conduct if sentenced to life in prison without the possibility of parole.... Rather than instruct the jurors that it was their duty to consider and, if appropriate, give effect to, all of the mitigating evidence presented by the defendant....

335 F.3d at 1040.

By this language, the majority determines that Belmontes' testimony and that of his witnesses ***constituted*** "mitigating evidence." A trial court cannot so instruct a jury.

The proposed instruction would have constituted a comment by the trial judge that he considered Belmontes' proffered evidence to *be* mitigating evidence. Judges are not supposed to make such comments about the evidence. The jury is the sole and exclusive judge of the credibility and weight of the evidence.[1/]

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1. The majority's proposed instruction is directly contrary to the jury instruction given triers of fact daily in California trial courts:

> You are the sole and exclusive judges of the believability of the witnesses and the weight to be given the testimony of each witness.
>
> In determining the believability of a witness you may consider any matter that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to the following:
>
> The demeanor and manner of the witness while testifying; The character and quality of that testimony; . . . The existence or nonexistence of a bias, interest or other motive; A statement previously made by the witness that is [consistent] [or] [inconsistent] with the testimony of the witness; . . .

To instruct the jury as the majority says should have been done would have constituted a charge that Belmontes' proffered evidence constituted mitigating evidence. Only where reasonable persons must accept the credibility of the evidence and its weight would such a characterization be proper. Such an instruction would amount to a directed verdict on an issue.

Such instruction also would have been argumentative. A trial judge should not pick and choose from the evidence and tell the jury what evidence to consider on an issue. That is the function of counsel.

Second, the majority repeatedly misquotes and mischaracterizes the language of "factor (k)" to narrow its application only to factors *preceding* the commission of the crime. The actual language of factor (k) is much broader; it allows consideration of evidence that predicts Belmontes' actions in jail.

The majority correctly quotes the language of "factor (k)" to allow the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," but then interprets that language to mean "petitioner's culpability for the crime he committed." 335 F.3d at 1061-62. "Most naturally read, this instruction allows the jury to consider evidence that bears upon the commission of the crime by the defendant and excuses or mitigates his culpability for the offense.... By its plain language, however, the instruction does not encompass events or considerations that are unrelated to the defendant's culpability." *Id.* at 1064.

By changing the language of the instruction from "extenuates the *gravity* of the crime ..." to "*culpability* for the crime," the majority shrinks the focus to factors which must have occurred before or at the time of the commission of the crime. But that is not an accurate reading of the phrase "extenuates the gravity of the crime." "Extenuate" means: "To lessen, to diminish; to

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weaken.... To lessen or seem to lessen the seriousness (of an offense, *guilt*, etc.) by giving excuses or serving as an excuse." WEBSTER'S UNABRIDGED DICTIONARY (2d ed.1979) (emphasis added).

Indeed, "extenuate" is given a much broader meaning by factor (k) than by the dictionary: it includes something that can lessen guilt but does *not* constitute a legal excuse. For example, as I read factor (k), it would include restitution paid to the victim by a thief after he was caught.

I would suggest that the language "gravity of the crime" focuses not only on the culpability of the criminal, but includes the effect on society in general. To the extent that the criminal taunts or gloats after his crime, the gravity of the crime is enhanced. To the extent that the criminal shows remorse, repents or rehabilitates himself, the gravity of the crime is diminished.

The majority does not agree, but it disagrees *only* after changing the language of factor (k), as noted above: "Moreover, unlike in *Boyde*, 'society' has not had a 'long held view' that a defendant's likely future conduct can serve to mitigate or excuse his commission of a serious crime. Rather, the doctrine is a legal concept peculiar to capital punishment cases." 335 F.3d at 1064.

The majority is again talking about the commission of a crime, not the *gravity* of the crime. All mitigation for the *commission* of a crime must precede its execution; the circum-stances that extenuate the *gravity* of a crime do not necessarily precede its execution.

Practically all that has to be said is said quite well by Judge O'Scannlain:

> Likewise, because factor (k) allows the jury to consider Belmontes's character and background, there is no reason to think that the jury would have thought it was foreclosed from using such information to consider his future potential

> if sentenced to life in prison. As the Supreme Court has noted, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an *inevitable* and not undesirable element of criminal sentencing." *Skipper*, 476 U.S. at 5, 106 S. Ct. 1669 (emphasis added); *see Boyde*, 494 U.S. at 382, 110 S.Ct. 1190, 108 L.Ed.2d 316 ("Petitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death."); *cf. Johnson*, 509 U.S. at 370, 113 S.Ct. 2658, 125 L.Ed.2d 290.

335 F.3d at 1073.

The majority has taken a defense argument (good pre-trial conduct establishes hope for good future conduct) and elevated it into a *required instruction*. Nothing in the law requires or allows that.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FERNANDO BELMONTES, Petitioner,	)	Civ. S-89-0736 DFL JFM
	)	MEMORANDUM OF OPINION AND ORDER
v.	)	
ARTHUR CALDERON, Respondent.	)	

I.

Petitioner Fernando Belmontes was convicted of the first degree murder of Steacy McConnell. McConnell's parents found her unconscious on the floor of her residence in Victor, California, on Sunday, March 15, 1981. McConnell died shortly thereafter from cerebral hemorrhaging caused by 15 to 20 blows to her head with an iron dumbbell bar. McConnell suffered defensive injuries to her hands, arms, and feet, and the force of the blows to her head cracked her skull. The house had been ransacked and McConnell's stereo was missing.

A. Evidence presented at the Guilt Phase

1. Prosecution's case

Belmontes was spending the weekend in Lodi with his friend Bobby Bolanos. Both knew Domingo Vasquez, who was acquainted with McConnell. On Tuesday of the week preceding the murder, Vasquez, Bolanos, and others had spent the evening "partying" at McConnell's house. Bolanos left early Wednesday morning. When Bolanos and Belmontes ran into Vasquez that Friday, he told them that he had stolen some "black beauties" – methamphetamine pills – from McConnell and that she had

kicked him out of her house.

Bolanos testified against Belmontes at trial and pled guilty to burglary in exchange for immunity from prosecution for felony murder. Bolanos testified that on Sunday morning, he and Belmontes drove to Vasquez's house in Bolanos' car, a black 1967 Chevrolet. When they arrived, Vasquez was talking on the phone with McDonnell. After Vasquez hung up, he informed them that McConnell's parents were coming to pick her up and that she would be gone all day. Belmontes, Bolanos and Vasquez were all short of funds, and they agreed to burglarize McConnell's residence, steal her stereo, and "clean house." Vasquez's girlfriend Karrie Lynn Rogers, testified that as the men departed Belmontes carried with him an iron dumbbell bar that she used as a tortilla roller.

The three men traveled to Victor in Bolanos' car. They agreed that Bolanos and Vasquez would wait in the car a short distance from the house, while Belmontes entered the house alone to collect valuables and place them near the rear door. In accordance with the plan, Bolanos and Vasquez waited about 5 minutes before driving up to McConnell's house and backing into the driveway. Vasquez got out to open the trunk but was unable to find the right key. When Bolanos got out to help him, he heard repeated banging noises coming from within the house. Bolanos opened the trunk and then waited in the car while Vasquez walked up to the front door. Shortly after Vasquez entered the house, he and Belmontes emerged carrying stereo components. According to Bolanos, Vasquez looked "like he had seen a ghost," while Belmontes had blood on his face and his pants. Belmontes told Bolanos that he "had to take out a witness," because McConnell was home. He explained that McConnell had heard Bolanos and Vasquez drive up, and when she turned to look out the window, Belmontes hit her with the bar.

Lucy Flores, a neighbor of McConnell's, saw Bolanos' car back into McConnell's driveway on the morning of the murder.

She observed a man get out of the passenger seat and try to unlock the trunk. He appeared to have trouble with the lock, whereupon the driver got out of the car and unlocked the trunk. The driver got back in the car, while the passenger walked toward the house and met a third man. Flores did not see where the third man had come from. Shortly, she saw the two men exit the back door of McConnell's house, carrying stereo equipment, which they loaded into the trunk before getting in the car and driving off.

Bolanos testified that en route to Galt, where they intended to fence the stereo, Belmontes wiped blood off of the metal bar and his shoes. The men agreed to dispose of the bar by throwing it from a bridge into the Mokelumne river. Bolanos later led police to the spot on the river bank from which the bar was recovered. The men went to the home of Domingo's brother, Manuel Vasquez, where Belmontes changed into a borrowed pair of pants. Raul Barron was contacted, and met the men at the home of Irma Vasquez, Domingo's sister. Barron purchased McConnell's stereo components for $100. Barron testified that he paid the $100 to the man in the baseball cap (Belmontes), who did most of the talking during the transaction.

Bolanos' girlfriend, Teresa Cobarrubio, testified that Bolanos gave her $15 that same day from the proceeds of the sale of the stereo. Bolanos appeared scared, and told Cobarrubio that he, Belmontes, and Vasquez had burglarized McConnell's home. The following day, Bolanos and Cobarrubio read a newspaper account of McDonnell's murder, and Bolanos related further details of the crime. He told Cobarrubio that he had remained in his car and that Belmontes had exited from the house with blood all over his clothes and stated that he "had to take a witness out."[1/]

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1. Cobarrubios also testified that she recalled running into Barbara Murillo, Belmontes' girlfriend, at the Grape Festival several months after the murder. Murillo asked if Belmontes had committed the murder. Cobarrubio

The day after the murder, Vasquez called Bolanos to advise that he had been questioned by the police in relation to McConnell's murder. Bolanos and Belmontes went to Vasquez's house and talked in the living room. Carrie Lynn Rogers, Vasquez's girlfriend, who subsequently married him, and who was a cousin of Bolanos', testified that from the kitchen she overheard the men discussing the crime, and, specifically, that she heard Belmontes describe how he had entered the house alone and hit McDonnell multiple times with the bar before Vasquez joined him in the house.

After the meeting at Vasquez's house, Belmontes phoned his girlfriend, Barbara Murillo. Murillo testified that he told her he was in trouble. He said that he had gotten into an argument with McDonnell at her house, become angry, and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep." (RT 1710:20-1711:17.)

Petitioner fled to Southern California, where he was arrested pursuant to a warrant six days after the murder. Blood found on one of his shoes was tested and found to match McConnell's blood type.

Belmontes furnished three tape-recorded statements to police in the three days after his arrest. He initially denied any involvement in a plot to burglarize McConnell's house.[2/] In the

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responded affirmatively. Murillo then asked if she thought Belmontes "might have been set up." Cobarrubio replied: "well, he might have." Cobarrubio testified that she had no information that suggested Belmontes had been set up, but answered as she did because she felt sorry for Murillo. (See RT 1489-1495.)

2. While speaking with Detective Holman, Belmontes denied having been at McConnell's house after the end of February, and specifically denied having planned to burglarize her home on the morning of March 14:

Holman: Let me ask you this: Do you remember being over at

second session, he admitted to the burglary, and acknowledged having entered the house alone, but denied having hit McConnell. In his third statement to police, Belmontes admitted to having hit McConnell, but insisted that he did so only once, on the right side of her head, and only after Vasquez entered the house and told him to. Belmontes stated that the first blow caused McConnell to fall down, and that he then proceeded to search the house for valuables, leaving Vasquez alone with McConnell.

Belmontes was unable to explain how McConnell acquired the additional 14 to 19 bludgeoning injuries on the left side and back of her head, and expressed disbelief that she had been hit so many times.[3/] He stated at one point that Vasquez had hit McConnell, but elsewhere in the same session told police that he did not see or hear Vasquez strike McConnell during the time that he was searching the apartment. (See RT 1819:3-8;

Domingo's house on Sunday morning and talking about going over to Steacy's house to rip her off?

Belmontes: Sunday morning?

Holman: Yeah. Last Sunday morning.

Belmontes: Rip her off?

Holman: Yeah.

Belmontes: Huh uh. (Negative) Wasn't talking about that or nothing.

(RT 1784:18-27.)

3. The transcript of Belmontes' third police interview contains the following exchange:

Holman: Let me ask you; you know I am having a hard time figuring out how she got so many blows on her head.

Belmontes: Hey that freaked me out.

Holman: By the same weapon, I mean they appear to be all caused by the same weapon. I don't know, what do you think happened?

Belmontes: I really don't know man. That shocked the shit yesterday when you told me that it was about 20 times . . . I can sincerely say that I didn't get her no damn 20 times.

(See RT 1848:6-22.)

1850:22-1851:5.) Belmontes admitted that he had gotten blood on his pants, that he had not seen any blood on Vasquez, and that only he had changed pants when they arrived at Manuel Vasquez's house. (RT 1861:2-19.)

The pathologist who performed the autopsy on McConnell, Dr. Maduros, testified that the first blow, to McConnell's right temple, was of much less force than the others, and likely was of insufficient force to render her unconscious. (See RT 1751:7-1753:8; 1759:15-26.) Dr. Maduros also testified that McConnell had defensive injuries on her hands, arms, and feet, which indicated that she had been conscious through some portion of the attack after the first blow. (See RT 1754:2-1756:14.)

2. Defense case

Belmontes' theory at trial was that Vasquez was the killer, and that he must have dealt the additional blows to McConnell while Belmontes was searching the back rooms of the house. Belmontes testified that after he, Bolanos and Vasquez agreed to steal McConnell's stereo, they drove to Victor and parked a block away from McConnell's house. Belmontes walked to McConnell's house and knocked on the door. He stated that when she answered the door, he abandoned his intent to burglarize the house, but entered at her invitation to avoid arousing suspicion. Belmontes and McConnell stood by the table talking while she ironed clothes.

Five minutes after Belmontes entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Belmontes followed behind her. Vasquez rapped on the door. According to Belmontes, the sequence of events was such that, after pulling up, Vasquez must have promptly come to the front door; under Belmontes' version, Vasquez would not have had time to go to the trunk of Bolanos' car, as both Bolanos and the neighbor, Lucy Flores, testified.

Vasquez pushed the door open, saw McConnell, and ordered Belmontes to "hit her." Belmontes did as he was told, and hit McConnell in the side of the head with the bar. She fell to the floor, and Belmontes dropped the bar. Belmontes then ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room. Upon returning to the front of the house, Belmontes saw Vasquez standing in the same spot holding the metal bar. He had not seen Vasquez hit McConnell nor heard any blows landing, because he was not paying attention. He could not explain the presence of defensive bruises and contusions on McConnell's hands, arms, and feet.

Belmontes and Vasquez exited the house carrying McConnell's stereo components, which they placed in the trunk of Bolanos' car. Vasquez got in the back seat, and Belmontes rode in the front, next to Bolanos, who drove. Belmontes testified that Vasquez handed him the steel bar, stating that he had to take out a witness. The bar had blood, flesh and hair on it. Petitioner wiped blood off the bar using his gloves and set it down on the floor. He denied having wiped any blood off of his shoes. Bolanos and Vasquez told him to throw the bar out his window into the river, and he complied.

The three drove to Manuel Vasquez's house, where Belmontes changed into a pair of Manuel Vasquez's pants because his had blood on them. After selling the stereo to Raul Barron for $100, the three men drove to Lodi, divided the money, and bought some beer. They drove to Domingo Vasquez's house, where Vasquez allegedly changed his pants. They then drove to the home of an acquaintance to purchase narcotics.

Belmontes' girlfriend, Barbara Murillo, testified that she ran into Cobarrubio at the Grape Festival six months after the murder. Murillo testified that she believed at the time that Belmontes was the murderer. But when she asked Cobarrubio for further details about the crime, the latter claimed that Belmontes had been "set up" because he had no backup in the area, while Vasquez had a network of local friends.

The jury convicted Belmontes of first degree murder, and made special findings that Belmontes personally committed the murder, that the murder was wilful, deliberate, premeditated, and intentional, and that the murder occurred during the commission of the crime of burglary. The case then proceeded to the penalty phase.

B. Evidence presented at the penalty phase

1. Evidence in aggravation

At the penalty phase, the prosecution introduced evidence of (i) Belmontes' acquisition of a handgun by threat, in 1979; (ii) his carrying the gun for protection shortly thereafter; (iii) his April 1979 conviction as an accessory after the fact to voluntary manslaughter; (iv) an altercation with another inmate during Belmontes' incarceration in a county youth facility; (v) a domestic assault on Barbara Murillo in the month preceding McConnell's murder; and (vi) autopsy photographs depicting McConnell's fatal injuries.

(i) Acquisition of the handgun

William Cartwright, the manager of a motel in Ontario, California, testified to an incident in early 1979 in which an individual identified as Rudy met Belmontes at the motel and offered to sell him a .32 caliber automatic handgun that he had acquired in a burglary. Belmontes examined the loaded weapon, and then cocked the trigger and pointed it at Rudy, stating: "I've got it now. Why buy it?" Rudy left the premises and Belmontes retained the weapon.

(ii) Carrying the gun

Steven Cartwright testified that he had a conversation with Belmontes in February 1979 in which Belmontes stated that some people were upset with him. As Belmontes said this, Cartwright testified, he indicated that he had a gun in his belt, by

slapping his side, and stated that he was not concerned because he had all the protection he needed.

(iii) Prior conviction

The prosecution and defense stipulated that Belmontes pled no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter, in the death of a Jerry Howard.[4]

(iv) Altercation with other inmate

In May 1979, defendant was a ward in a California Youth Authority facility under the supervision of group counselor Ron Cutler. Cutler testified to an incident in which he observed Belmontes and another ward preparing to fight. Cutler testified that Belmontes, who was significantly smaller than the other youth, was about to hit the other with a chair when Cutler intervened and knocked the chair away.

(v) Domestic violence

In February 1981, Belmontes was living with his two year old daughter and the girl's mother, Barbara Murillo, who was then four months pregnant with their second child. Murillo testified to an argument that escalated into an altercation between Belmontes and Murillo when Murillo told Belmontes to leave their apartment. Belmontes pushed Murillo and hit her in the head, at one point causing her to drop their daughter. After

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4. The court did not permit the prosecutor to introduce evidence that Belmontes had actually murdered Jerry Howard, execution-style. (See RT 2239:1-3; 2262 16-18.) The prosecutor's proffer included: (i) testimony from an eyewitness who was prepared to testify that he saw Belmontes shoot Howard; (ii) testimony from a counselor at a California Youth Authority camp that Belmontes had confessed to killing Howard after receiving parole for his accessory conviction; (iii) testimony from another individual who had seen Howard get into a car with Belmontes on the evening he was killed; and (iv) testimony from a police officer who found the murder weapon at Belmontes' house. (See RT 2239:8-2240:27; 2261:10-25.)

pushing her to the ground, Belmontes attempted to choke her, before the two were separated by friends who were present. When Murillo started to call the police, Belmontes cut the telephone cord with a knife. Murillo at one point fled the apartment through a window, but Belmontes dragged her back to the vicinity of the apartment. A neighbor eventually summoned police, who arrived as Belmontes was leaving the apartment.

2. Evidence in mitigation

Belmontes' maternal grandfather, Michael Salvaggio, testified that his daughter was sixteen when she married Belmontes' father. Belmontes' father was unemployed, and unable to support his family, requiring extensive financial support from Salvaggio. When Salvaggio got the elder Belmontes a job, he was still unable to support his family because he "drank it away." (RT 2315:1-10.) Salvaggio characterized Belmontes' young life as "terrible," and marked by physical abuse of Belmontes' mother, including a broken arm. (RT 2315:11-2316:2.) Salvaggio also testified that Belmontes had a wonderful relationship with his grandmother, who died in 1978. After Belmontes' grandmother nearly drowned while swimming, she lingered in a coma for two weeks before dying, and Belmontes visited her almost every day in the hospital.

Belmontes' mother, Carol Belmontes, testified that her marriage to Belmontes' father was an unhappy one. He "wouldn't ever work," and was an alcoholic, who beat her. (RT 2324:18-26.) he broke her arm once, and stabbed her on another occasion. Mrs. Belmontes' marriage to him lasted about 11 years, and she remarried after she and Mr. Belmontes were divorced. Her second marriage broke up five years later, when Belmontes was fifteen. After that, he became hard for her to control.

Mrs. Belmontes testified that Belmontes had remained very close to her and to his sister. Mrs. Belmontes' testimony concluded with the following exchange:

Q: What kind of qualities can you recommend to this jury as they consider his faith [sic]?
A: I don't believe that he should go to the gas chamber.
Q: Just because you're his mother?
A: No. I don't believe he did it.
Q: Are you aware of the facts of this case?
A: (Affirmative nod) I know my son.

Mr. Schick: I have no more questions.

(RT 2327:16-20.)

Robert Martinez, a close friend of Belmontes' since their early teens testified on Belmontes' behalf. He testified that he and Belmontes spent a great deal of time together, working on Martinez's low rider car, and occasionally smoking marijuana and drinking beer. Belmontes served as best man at Martinez's wedding, and was someone who Martinez would go talk to when he had problems with his wife.[5/]

Martinez's wife Darlene testified that she considered Belmontes a close friend. She was a born-again Christian. When Belmontes visited with Mr. and Mrs. Martinez after his release from the California Youth Authority, he advised her that he too was a born-again Christian. He also mentioned his struggling relationship with Murillo and expressed concern that she was not Christian.

Belmontes testified in his own behalf. He testified that his father used to hit his mother frequently, and often came home

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5. Martinez testified that Belmontes was not a violent person. However, that testimony was stricken, on objection from the prosecutor, who argued that if Martinez's opinion evidence were admitted then the prosecutor should be permitted to introduce evidence of Belmontes' participation in gang violence and his alleged execution-style killing of Harmon.

drunk. Although he acknowledged the difficulties in his childhood, Belmontes indicated that he did not want to use his childhood "as a crutch, to say I am in a situation right now, I'm here because of that." (RT 2343:25-27.) Belmontes testified about his time in the California Youth Authority Pine Grove Camp, and his acceptance of Christianity through his involvement in the M-2 Christian sponsorship program. Belmontes testified that he initially entered that program as a way to get occasional time away from camp, but that he was touched by the decency of his M-2 family, the Haros, and so gradually became curious about Christianity and eventually embraced it. Belmontes testified that, although initially ranked as a the last man on the fire crew, he managed to work his way up to number 2 man after his involvement withe the M-2 program helped him to "straighten my head out." (See RT 2347:27-2348:17; 2355:3-9.) After his parole from the Youth Authority, Belmontes got a job with the United States Forest Service and rented an apartment with Barbara Murillo near Lodi, in part so that he could be near his M-2 sponsors, Fred and Beverly Haro. Belmontes testified that he had trouble maintaining his religious commitment from that point on, and started "going back to [his] old ways." Belmontes testified that, if sentenced to prison, he planned to "get into music," "read a lot," and "just try to stay alive." (RT 2357:24-2359:26.)

The Reverend Dale Barrett testified that he knew Belmontes from Belmontes' participation in the M-2 program, under which an inmate at the Youth Authority facility would be matched with a local family and spend time in the family's home on Wednesday and weekends. Barrett matched Belmontes with the Haros. Belmontes participated in church activities "to a very high degree," (RT 2379:24-25), and was "one of the more sociable young men involved in the church." (RT 2380:1-2.) Belmontes was eventually baptized during his time in the Youth Authority camp. Barrett testified that his church is very selective about baptism, and that it is based on "how serious we feel they are about the commitment they have made." (RT 2380:15-2381:5.) Only a small percentage of participants are baptized.

Barrett felt that Belmontes' participation in the program and religious conversion was sincere, and that Belmontes was not among those participants who are motivated primarily by the desire to get away from the camp. Barrett testified that he believed in the death penalty, but thought it inappropriate in this case because he saw Belmontes as "salvageable," (RT 2384:1-11), and because he thought premeditation "a debatable point" in this case.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and the Northern California Director of the M-2 program testified that Belmontes had been helpful to the program on several occasions since his release from Pine Grove, when he visited Preston and spoke with wards there about "what it was like on the outside," to help prepare them for release. Miller testified that if Belmontes were imprisoned for life, he anticipated using Belmontes to counsel "other men in the prison so that other fellas when they get out don't get into the same thing that he has gotten into." (RT 2397:5-7.)

The Haros testified to their relationship with Belmontes when he was incarcerated at Pine Grove and after his release. Belmontes was in their home for three days each week for much of the year he spent at Pine Grove. Fred Haro spent quite a bit of time talking with Belmontes, "about his home, his life, what his plans were, where he was going, what he wanted to do, and that kind of counseling." (RT 2402:25-27.) Haro testified that Belmontes responded very well to the program, and that Belmontes had been a very good influence on the Haros' teenage son, who was experiencing some problems. Fred Haro also testified that he was "strongly for the death penalty" but believed that it was inappropriate in this case because he believed that Belmontes was innocent. Beverly Haro testified that she saw Barbara Murillo as a "definite negative factor in Fernie's life." (RT 2416:6-26.)

C. Procedural History

Belmontes was convicted of first degree murder on August 6, 1982. On October 6, 1982, the court sentenced Belmontes to death. On June 23, 1988, the California Supreme Court affirmed the judgment. See People v. Belmontes, 45 Cal.3d 744, 248 Cal. Rptr. 126 (1988). The United States Supreme Court denied Belmontes' petition for writ of certiorari on January 13, 1989. See Belmontes v. California, 488 U.S. 1034, 109 S. Ct. 848 (1989) (Mem.).

Belmontes filed a petition for writ of habeas corpus with this court in May, 1989. Later that year, petitioner filed a state habeas petition and received a stay of execution from the California Supreme Court. This case was administratively closed during petitioner's state court proceedings. On June 29, 1993, this case was reopened. On February 16, 1994, petitioner filed an amended petition . On November 4, 1994, petitioner filed a second amended petition. In May 1995 the court denied respondent's motion to dismiss.

The second amended petition asserts 23 claims, in two parts. Part A asserts 14 claims related to the guilt phase, and Part B asserts 9 claims related to the penalty phase. On July 24, 1995 petitioner filed a motion for summary judgment on the following claims: A-5 through A-7, A-9, A-13, A-14, B-2 through 5, B-7, and B-8. Respondent opposed the motion and filed a cross motion for summary judgment on August 25, 1995. On September 30, 1996, the Magistrate Judge denied petitioner's motion for an evidentiary hearing on certain other claims, whereupon petitioner filed a memorandum of law seeking summary judgment on claims A-1 through A-4, and B-1. (See Mem. Points and Authorities, filed November 6, 1996, at 2 (characterizing petitioner's motion as "the functional equivalent of a summary judgment motion").) Respondent opposed the motion and moved for summary judgment.

On February 1, 2000, the court withdrew the referral of this case and the pending motions from the assigned magistrate judge. The court now denies petitioner's motions for summary

judgment, and grants respondent's motion. The petition is therefore denied with respect to all claims except the six that the parties have not yet briefed, claims A-8, A-10 through 12, B-6, and B-9.

II.

Belmontes seeks summary judgment on ten claims arising out of his guilt phase trial and seven claims arising out of the penalty phase.

A. Guilt Phase

1. Claim A-1

Belmontes argues that he was deprived of due process by the prosecutor's failure to disclose material benefits conferred on Bobby Bolanos, and by the prosecutor's failure to correct false or misleading testimony by Bolanos about those benefits. According to Belmontes, the prosecutor arranged for the dismissal of drunk driving charges arising out of an incident that occurred one week prior to the murder of Steacy McConnell. Defense counsel was not informed of the dismissal of these charges before trial, which may have violated the prosecutor's duty to disclose benefits conferred on witnesses in exchange for cooperation. See Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 766 (1972); Singh v. Prunty, 142 F.3d 1157 (9th Cir. 1998).

The evidence of the dismissal of drunk driving, hit and run, and other charges against Bolanos could have been used to impeach Bolanos, and thus should have been disclosed. See Singh, 142 F.3d at 1161.[6/] The prosecutor's failure to disclose

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6. It is undisputed that the dismissal of Bolanos' drunk driving and hit and run charges was secured by Mr. Sueyres, the prosecutor in Belmontes' case. Respondent argues that the prosecutor was under no duty to disclose the dismissal of the traffic offenses because the dismissal was not

the benefits given to Bolanos in exchange for his testimony, however, violated Belmontes' right to due process only if the undisclosed evidence was material. See Singh, 142 F.3d at 1161. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985).

On this record, there is not a reasonable probability that had the prosecutor disclosed the evidence in question, the result of the trial would have been different. In contrast to Singh, it was already clear to the jury here that Bolanos had received significant benefits form the prosecutor, and that he was not testifying out of altruism. Cf. Singh, 142 F.3d at 1162. Although Bolanos could have been prosecuted for felony murder, the jury heard the details of his plea agreement, and defense counsel impeached him on cross examination with the fact that murder charges against him had been dismissed in exchange for his testimony and his guilt plea to a burglary charge. The additional impact on his credibility of disclosure of the dismissal of relatively minor misdemeanor traffic charges could not have amounted to much.

Belmontes argues that the prosecutor's failure to disclose was compounded by Bolanos' false or misleading testimony about the dismissals and about his previous arrest record. A prosecutor must correct testimony given by a prosecution witness that the prosecutor knows to be false or misleading. See United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 338-82 (1985). When asked about an inconsistency[7] between his trial testimony

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part of the consideration for Bolanos' testimony, but was a gratuitous act on the part of the prosecutor. (See Return at 54-68.) However, so long as Bolanos knew or suspected that he was receiving a benefit from the prosecutor, the evidence could be impeaching, whether or not the benefit was part of the plea bargain.

7. The inconsistency concerned the length of time that Belmontes was in the house alone. Although Bolanos initially told the police it was 20-

and his first statement to police, Bolanos explained it by saying that "I didn't have my head straight [during the interrogation] . . . there was a lot of investigators there . . . and the DA and you know, cops and whatever. That's the first time I got busted. I wasn't even thinking then." (RT 1449:28-1450:5.) This statement may have been untrue, depending on what Bolanos meant by "busted."

The prosecutor in Belmontes case, Clark Sueyres, knew of Bolanos' arrest for drunk driving, as Sueyres personally appeared in court to dismiss the drunk driving charges against Bolanos, in which Bolanos had been arrested just a week before his arrest and interrogation in the McConnell murder. Sueyres was thus under a duty to correct Bolanos' statement that his second arrest in one week's time was "the first time I got busted." Although this correction, if made, may have helped to impeach Bolanos, the impeachment on a minor point would not have been significant.

In light of the other, overwhelming evidence of Belmontes' guilt, the failure of the prosecutor to correct the misleading statement or disclose the dismissal of the drunk driving charge was harmless beyond a reasonable doubt. Petitioner seeks to portray the trial as little more than a swearing contest between him and Bolanos as to whether Belmontes or Vasquez was the perpetrator of the fatal blows, but, in fact, other evidence supported Bolanos' testimony, and undercut Belmontes'. First, Bolanos testified that after he pulled into the driveway, Vasquez exited the car, and tried to open the trunk. Vasquez could not find the right key, and Bolanos eventually had to help him, after which Vasquez went up the porch steps and into the house. Bolanos' testimony was substantially corroborated by the testimony of McConnell's neighbor, Lucy Flores, who watched the passenger get out of Bolanos' car and try unsuccessfully to open the trunk, eventually prompting the driver to come to his

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30 minutes, at trial, he testified that it was about five minutes. (See RT 1449:20-1450:6.)

assistance. Belmontes, however, testified that for his version of events to be true, Vasquez must have come to the door immediately after Bolanos' car pulled into the driveway, and that

Vasquez "didn't have time to open the trunk." (See RT 2023:8-13.) Second, Dr. Maduros, the pathologist, testified at trial that the blows that cracked McConnell's skull would have made a sound "like a cracked pot." (RT 1748:21.) This testimony was consistent with Bolanos' testimony that when he and Vasquez were opening the trunk, he heard a repeated "banging noise" coming from inside the house. (RT 1391:22-28.) Belmontes testified that he had hit McConnell once with the iron bar, and then dropped the bar, leaving McConnell alone with Vasquez while he searched the back bedroom and kitchen area. Yet Belmontes testified that he had heard no unusual sounds while he was searching the small home. (See (RT 19999:16-21.) Third, Belmontes was unable to explain how McConnell acquired the extensive defensive injuries on her hands, arms, and feet if, as he said, he knocked McConnell unconscious with one blow, and Vasquez subsequently delivered the fatal blows to her head. Moreover, Dr. Maduros' testimony was inconsistent with Belmontes' claim that his single blow to the right temple knocked McConnell unconscious. (See RT 1759:15-26.) Finally, there was no dispute that it was Belmontes who took the murder weapon into McConnell's home, emerged covered with blood, unlike Vasquez and Bolanos, negotiated the sale of the stolen items, and gave false exculpatory statements to the police. In short, there is no reasonable likelihood that impeachment regarding Bolanos' "first time I got busted" comment or the dismissal of drunk driving charges would have led the jury to believe Belmontes' incredible tale over Bolanos' which was corroborated in crucial respects by other witnesses and physical evidence.

2. Claim A-2

Belmontes argues that he was deprived of due process by the

prosecution's use of inculpatory statements that were allegedly involuntary because of police coercion. According to petitioner, the police made threats about the death penalty if he did not confess and offered the hope of leniency if he did.

Petitioner made three separate statements to police after his arrest, two while in jail in Ontario, California, and one after he was returned to San Joaquin county. The statements were tape recorded. This claim is based on Belmontes' allegation that the police detectives who interrogated him made threats regarding the death penalty or promises of leniency during the two to three minute interval between his first and second tape-recorded statements, and thereby rendered his subsequent statements involuntary. The transcripts of petitioner's tape recorded statements to police, however, directly contradict the claim that the police made either threats or promises to induce Belmontes to talk. At the beginning of petitioner's second statement, petitioner expressly stated that the detectives had not threatened him, and had not promised him anything, and that they were resuming the interview at his request. (See RT 1799:1-1800:4.)

Based on this evidence, the California Supreme Court held that "our independent review convinces us that no improper threats or promises of leniency were made to defendant. Deputy Holman testified that he did not, as defendant contends, 'threaten him with the death penalty.' Deputy Cooper's best recollection was that the term 'death penalty' may have been mentioned at some point, but that if it was, it was not done so with intent to scare or coerce defendant into confessing." People v. Belmontes, 45 Cal.3d 744, 248 Cal. Rptr. 126, 140 (1988). Moreover, the Court held, "defendant's own responses at the beginning of his second tape-recorded statement support the officers' testimony that he was not 'threatened' with the death penalty, nor were any promises of benefit or leniency offered as inducement for his statements." (Id.) Although the ultimate issue of voluntariness may be viewed as a mixed question of law and fact, warranting independent review under the Pre-AEDPA version of § 2254(d), cf. Thompson v. Keohane, 516 U.S. 99, 106, 116 S. Ct. 457, 462

(1995), the state Supreme Court's underlying factual finding – that no improper threats or promises were made – is a pure factual finding, entitled to deference. Id.; see also Townsend v. Sain, 372 U.S. 293, 306 n.6, 83 S. Ct. 745, 756 n.6 (1963).

3. Claim A-3

Petitioner argues that he was deprived of the effective assistance of counsel by his attorney's failure to challenge the validity of the arrest warrant and the seizure of his blood-stained shoes at the time of arrest. Petitioner argues that the affidavit filed in support of the arrest warrant lacked probable cause, because it was based solely on the "inherently unreliable" statement of an accomplice, Bobby Bolanos, and because it omitted material facts. (See 1996 Mem. in Supp. at 9; Traverse at 17-19.) Because petitioner's claim is based on ineffective assistance of counsel, he must show that counsel's failure to bring a motion to suppress on these grounds fell below "the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, and that he suffered prejudice as a result. See Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994).

Although an accomplice's motives are often suspect, "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." Gates, 462 U.S. at 234, 103 S. Ct. at 2330. An affidavit based on an informant's statement supplies probable cause where "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay." Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983) (citations and internal quotation marks omitted). Here, as the California Supreme Court noted on direct appeal, "the circumstances of the crime scene - as summarized in the affidavit - corroborated Bolanos' statements." People v. Belmontes, 45 Cal.3d 744, 768 248 Cal. Rptr. 126, 137 (1988). The affiant indicated that McConnell's

house had been "ransacked," and Bolanos stated that the murder had taken place during a burglary. The autopsy report that was incorporated into the affidavit indicated that McConnell's death was caused by "blunt trauma to the head," and Bolanos stated that defendant had beaten the victim with an iron bar. The detailed, first hand nature of Bolanos' description of the crime was sufficient to establish probable cause for the issuance of a warrant. Because the affidavit established probable cause for the issuance of the warrant, Belmontes had not established either deficient performance or prejudice.

Second, petitioner argues that material information was omitted from the affidavits which might have caused the judge who issued the warrant to question Bolanos' credibility. The primary fact identified by petitioner in this regard is that McConnell's neighbor, Lucy Flores, had seen Bolanos' car at the place and time of the crime. It is not obvious that this fact would diminish Bolanos' credibility. Petitioner suggests that it would show that Bolanos was "a cooked goose," but the judge knew this already, in light of the statements recounted in the affidavit in which Bolanos confessed his involvement in a felony, the burglary of McConnell's house, that resulted in a murder. Indeed, had the affidavit fully recounted the information provided by Flores, it would have provided further corroborating detail, such as the fact that Bolanos remained with the car, and never entered McConnell's home. Similarly, had the affidavit included details of Teresa Cobarrubio's statement to police, it would have reinforced, not undermined, the version of events provided by Bolanos, by showing a prior consistent statement on Bolanos' part. In sum, none of the omissions identified by petitioner undermine the judge's finding of probable cause.

4. Claim A-4

Belmontes argues that he was deprived of due process and the effective assistance of counsel due to a conflict of interest that resulted from his counsel's prior representation of Mr. Vasquez. Before the cases against Belmontes and Vasquez were severed

for trial, Vasquez's counsel moved to disqualify Schick as counsel for Belmontes, on the basis of a possible conflict of interest, because a member of Schick's firm had represented Vasquez in a 1979 murder charge that had been dismissed. Schick filed a declaration stating that he knew no confidential information concerning the murder charge, he had not appeared on behalf of Vasquez in that case, and the file in the murder case had been destroyed over eight months earlier. The state court denied the motion, noting "the lack of real contact Mr. Schick had or anyone in his office has had that has remained in the office with Mr. Vasquez." (Add. RT at 105:13-108:16.)[8/] The subsequent investigation by Belmontes' habeas counsel has revealed that the prior representation of Vasquez was more extensive than Schick disclosed at the time of Vasquez's motion. Seven years before Belmontes' trial, Schick himself had represented Vasquez at the preliminary hearing stage of a firearm prosecution of Vasquez, when Schick was a deputy public defender. Schick does not remember the facts of the case or any discussion with Vasquez. Moreover, both of Schick's former partners in the law firm of Riddle, Schick and Jacobsen also represented Vasquez while working as deputy public defenders prior to the formation of the partnership. Mr. Riddle represented Vasquez in a 1974 rape case, and Mr. Jacobsen represented him in a 1976 robbery prosecution. Schick was not aware of the rape case during his representation of Belmontes. However, Schick did remember at the time of the recusal hearing that he and Jacobsen had both represented Vasquez when they were in the

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8. Although Belmontes waived any objection to the conflict, he now argues that trial counsel's failure to disclose the extent of the conflict invalidates the waiver. "Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case." Id. The context of Belmontes' waiver establishes that he was unaware of "the significance of the conflict," id. at 1500, because he did not realize that Schick had personally represented Vasquez, even though the representation was at a preliminary stage and involved a distinctly different matter. Thus, his limited waiver does not bar this claim.

public defender's office, but he did not volunteer that information to the court or to Belmontes, apparently on a view that these matters were too remote and unrelated to be of relevance. (See Respondent's Exhibits in Support of Return, Exh. C at 3:10-25; 6:1-6.)

Although Schick's primary theme at trial was that Vasquez was the actual killer, Belmontes claims that Schick pursued this defense half-heartedly, relying on the "safe harbor" of evidence produced by the police investigation into the crimes, rather than independently investigating Vasquez's background. According to Petitioner, "there existed a substantial corpus of evidence which would have strongly supported petitioner's trial defense but which was potentially adverse to Vasquez's legal interests, and . . . that evidence was neither disclosed by trial counsel to the court, nor was it investigated or presented to the jury." Specifically, Belmontes argues that Vasquez had a history of retaliatory violence that could have been used to impeach Bolanos with respect to a possible motive for falsely pinning the murder on Belmontes.[9/] Thus, according to Belmontes, had he been permitted to present character evidence as to Vasquez, he could have impeached Bolanos.

The Sixth Amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence, and the right to counsel's undivided loyalty. Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988) (citations omitted). "To establish a sixth amendment violation based on a conflict of interest the defendant must show 1) that counsel actively represented conflicting interests, and 2) that an

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9. The California Supreme Court found that there was no actual or potential conflict of interest, and rejected petitioner's argument that Schick's representation of petitioner may have been compromised, noting that the primary defense theory at trial was that Vasquez was the ringleader. See 248 Cal. Rptr. at 141-42. The court noted that Vasquez's criminal history would not likely have been admissible, and concluded that "the record contains no informed basis for concluding that a conflict of interest existed or affected trial counsel's performance to defendant's detriment." Id.

actual conflict of interest adversely affected his lawyer's performance." Id.; see also Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 1718-19 (1980). Unlike a challenge to counsel's competency, prejudice is presumed if the defendant demonstrates that counsel "actively represented conflicting interests," Cuyler, 446 U.S. at 350, 100 S. Ct. at 1719, and that such an "actual conflict of interest adversely affected his lawyer's performance." Id. at 348, 100 S. Ct. at 1718; see also Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984).[10/]

Once a petitioner has shown that an actual conflict existed, "the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely'." Miskinis, 966 F.2d at 1268. Failure to put on a certain defense or particular witnesses may constitute "adverse impact' under Cuyler unless the record demonstrates that a non-conflicted counsel would not have put on that defense or those witnesses. Miskinis, 966 F.2d at 1268-69.

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10. The Court has adopted a "fairly rigid rule of presumed prejudice for conflicts of interest." Strickland, 466 U.S. at 692, 104 S. Ct. 16 2067, because:

> . . . a rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case [involving a conflict of interest] the evil–it bears repeating–is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.

Holloway v. Arkansas, 435 U.S. 475, 490, 98 S. Ct. 1173, 1181-82 (1978); see also Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992).

In this case, the claim is not that Schick failed to present the defense that Vasquez was the actual killer; that was, in fact, Schick's primary defense theme. Rather, the claim is that Schick did not do enough to attack Bolanos' credibility by presenting him as fearful of Vasquez. But the record does not support this assertion. Defense counsel attempted to impeach Bolanos on every conceivable front. He asked questions designed to show that Bolanos was a friend and family member of Vasquez's family but was not frightened of Belmontes', and that Bolanos' true objective was to save his own hide. [11/] It is unreasonable speculation that Bolanos would have been further impeached by evidence of Vasquez's criminal record or past. The court finds no "adverse effect," with Cuyler, on this ground.

Belmontes' claim also founders on the "actual conflict" requirement. Generally, it is more difficult to show an actual conflict resulting from successive rather than simultaneous representation. See Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988). See also United States v. Wheat, 813 F.2d 1399, 1402 & n.1 (9th Cir. 1987) ("in successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties so that he is incapable of diligently representing his client."). Although Schick remembered that he had once represented Vasquez, he did not recall "the specific charges or the disposition," and the record is devoid of evidence that Schick divided his loyalties such that he was incapable of diligently representing his client. The earlier representation was entirely unconnected to the McConnell murder. On this record, therefore, the court cannot conclude that Schick actively represented conflicting interests. Where the alleged conflict arises out of successive representation, and the prior representation was completely

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11. In response to the questions designed to show intimidation or bias, the prosecutor brought out on redirect that Bolanos already had testified against Vasquez in a separate prosecution of Vasquez for the McConnell murder. (See RT 1476:1-12.)

unrelated and petitioner has not shown that any privileged information as either divulged or withheld, or that counsel's loyalties were divided, "no actual conflict existed." Mannhalt, 847 F.2d at 580.

Finally, petitioner argues that the trial court's failure to adequately investigate when it received notice of the possible conflict requires automatic relief under Holloway v. Arkansas, 435 U.S. 475 (1978). But Holloway is not applicable here. In that case, the state court rejected appointed defense counsel's repeated assertions that the interests of his co-defendant clients were adverse. Here, the court made appropriate inquiry of Schick when made aware of the potential conflict arising out of the prior representation of Vasquez by another member of Schick's firm. While the Sixth Amendment requires a trial court to investigate known conflicts, Belmontes has offered no authority for the proposition that the trial court's knowledge of facts giving rise to one potential conflict triggers a duty to ensure that there are no other, unknown conflicts. "[T]rial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. . . . Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." Cuyler, 446 U.S. at 347, 100 S. Ct. at 1717-18. The state court's inquiry was an adequate response to the evidence of an indirect, limited conflict that was then before it.

5. Claim A-5

Petitioner argues that he was deprived of due process when the prosecutor questioned him regarding his post-charging silence. In Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45 (1976), the Supreme Court held that it is unconstitutional for a prosecutor to impeach a defendant with evidence of post-arrest silence. Although prior inconsistent statements may constitutionally be used to impeach, silence may not.[12/]

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12. Where a prisoner waives his Miranda rights and speaks to

Petitioner takes issue with the following exchange during his cross examination:

> Q: Mr. Belmontes, from the time you talked to Deputy Holman and Deputy Cooper at the San Joaquin County Jail on March 22nd 1981, until today in this very courtroom you have never spoken to law enforcement concerning what happened on March 15, 1981?
> A: Have I spoken to officers?
> Q: About it. That's right.
> A: From the first day I got arrested?
> Q: No. From the jail statement on Sunday, when you were booked in the county jail and gave the third statement we have been calling the jail statement, until now you've never told law enforcement officers about it, anything else that happened there?
> A: No.
> [Defense counsel]: Judge, in fairness, I think the jury should be instructed once he's appointed an attorney, that conversation has to be directed through the attorney.
> [The court]: Yes. The question, ladies and gentlemen, is somewhat misdirected in the sense that Mr. Belmontes does not have to talk to anybody. As a matter of fact, he's admonished by his counsel, once lawyers have been appointed to represent him, not to talk to anybody. You should be aware of that fact. Without the presence of the lawyer.
> Q: All right. So from then until now you haven't been on the record about what happened?
> A: Not on the record. But a few times Officer Holman has taken me to court while we were in Lodi and we talked about it. But not on record.
> Q: About the details of the offense?

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officers, he may be impeached by statements he makes that are inconsistent with later testimony. But silence in reliance on Miranda warnings cannot be used to impeach. See Doyle v. Ohio, 426 U.S. 610 (1976); Phelps v. Duckworth, 772 F.2d 1410, 1412 (7th Cir. 1985).

A: Not really details. Just told him that I didn't do it. Told him that I was serious about when I said I hit the girl one time.

(RT 1973:1-1975:5.)

Unlike Doyle, this line of questioning was not an attempt to impeach Belmontes based on post-arrest silence – he was anything but silent – but was, rather, a clarification of how many statements Belmontes had made. In contrast with Doyle, the prosecutor here did not argue that Belmontes had fabricated the story he told at trial after the date of his third conversation with police, nor could he have done so; Belmontes' trial testimony was essentially consistent with the last version of events he related to police in the San Joaquin County jail. After the above exchange, the prosecutor made no reference to Belmontes' silence as tending to discredit his story. Even assuming, however, that the jury would have understood the exchange as Belmontes now suggests, as impeachment of Belmontes' credibility, it is clear that any Doyle error was harmless. In contrast with Doyle, the trial court here sustained Belmontes' objection to the prosecutor's question, and delivered a cautionary instruction at defense counsel's request.[13/] See Doyle, 426 U.S. at 614, 96 S. Ct. at 2243 (noting prosecutor's repeated references to defendant's silence, and trial court's overruling of objections); see also Phelps, 772 F.2d at 1413 (prejudice inquiry under Doyle depends, among other factors, on the use to which the prosecution puts the post-arrest silence; the quantum of other

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13. Petitioner argues that the instruction compounded, rather than cured, the problem, in that it emphasized petitioner's exercise of his right to remain silent. Inadvertent emphasis is a widely recognized hazard of objection, however. It is apparent from the transcript that defense counsel received precisely the corrective instruction that he demanded. Thus, the alleged Doyle violation may be waived. To the extent that petitioner may wish to argue that his counsel was ineffective in failing to make the correct objection, see U.S. v. Chavez, 193 F.3d 375, 378-79 (5th Cir. 1999), the absence of prejudice would be no less fatal to petitioner's claim under Strickland, than under Doyle.

evidence indicative of guilt; the intensity and frequency of the reference; and the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions). The only information developed was that petitioner spoke "off the record" to a deputy and made statements to the deputy that were consistent with his defense. In short, any error was clearly harmless beyond a reasonable doubt. See Phelps, 772 F.2d at 1413 ("Impermissible prosecutorial comment regarding post-arrest silence does not require reversal if the court determines it is harmless beyond a reasonable doubt.").

6. Claim A-6

Petitioner argues that the trial court improperly restricted the scope of cross examination of prosecution witness Carrie Rogers, who is Domingo Vasquez's wife. Petitioner's version of the events of March 15, 1981, was that he had struck McConnell only once, and that Domingo Vasquez must have struck the later, and fatal, blows. Carrie Rogers testified that she had heard petitioner state, on the evening after the murder, that he had struck the victim multiple times.

Belmontes' counsel cross examined Rogers as to her relationship with, and motive to protect, Vasquez, but was not permitted to inquire into Rogers' understanding of how her testimony could affect Vasquez's chances of parole.[14/] The trial court expressed concern that this line of questioning might distract the jury with collateral information about Vasquez's sentence, and so permitted cross examination about Rogers' motive to protect Vasquez's good name, but not about the more specific and tangible motive to facilitate his parole.

This restriction on cross examination was reasonable, and did not violate Belmontes' rights under the confrontation clause.

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14. At the time of Rogers' testimony, Vasquez had pled guilty to second degree murder in connection with McConnell's death and been sentenced to a term of fifteen years to life.

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, [or] confusion of the issues." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986). There was no evidence that Rogers believed that her testimony could affect Vasquez's parole date. In this circumstance, the court could conclude that opening up the topic of Vasquez's conviction and parole could lead to jury confusion and would not be probative. Moreover, even were the trial judge's ruling erroneous, it was plainly harmless. The record establishes that Rogers' loyalty to Vasquez was adequately demonstrated to the jury, in a number of ways. As the California Supreme Court summarized the record:

> Here the jury learned Rogers had been with Vasquez for eight years and had married him shortly after his arrest for McConnell's murder; that they had a daughter together; that she was seeing Vasquez on a weekly basis at the time of trial; that she had been living with Vasquez and supporting him on the date of the murder; that she knew Vasquez was keeping company with other women at that time and nonetheless "didn't do anything about it"; and that she did not come forward to report her information inculpating defendant as the killer until the eve of his trial. . . .
> . . .The prosecutor conceded in his opening argument: '[C]ounsel has suggested to you [Rogers] has a very definite interest in protecting a man, Domingo Vasquez, with whom she lives. Certainly, ladies and gentlemen of the jury, somebody that would marry someone who's been involved in something like this, when he's been cheating on her and she knows about it, that's loyalty. What else can you call it? And you have to take that into account in deciding whether to believe [Rogers]. Let's face it. That really calls into question her story.'

Belmontes, 248 Cal. Rptr. at 146 & n.10. The proposed cross examination would have been cumulative and would thus not

have produced a "significantly different impression of [Rogers'] credibility" than that which was presented to the jury. Van Arsdall, 475 U.S. at 680, 106 S. Ct. at 1436.

7. Claim A-7

Belmontes argues that the trial court improperly admitted hearsay evidence that bolstered the testimony of Bobby Bolanos, identifying petitioner, rather than Vasquez, as the murderer, and that the court compounded this error with an erroneous jury instruction that precluded the jury from considering Bolanos' motive to shift blame to petitioner. The jury heard testimony, from several sources, that Bolanos had previously told a consistent story to others. Bolanos himself testified, without objection, that he had previously told his girlfriend Teresa Cobarrubio that petitioner was the killer. Cobarrubio testified to the same effect, and police officer Coffey offered double hearsay, testifying that Cobarrubio had told him that Bolanos had told her that petitioner was the killer. The trial court admitted these last two statements as prior consistent statements, to rebut Belmontes' argument that Bolanos had fabricated his story to protect Vasquez. Petitioner argues that the trial court erred, because Bolanos' motive to protect Vasquez predated the prior statements.

"A state court's evidentiary ruling is grounds for federal habeas corpus relief only if it renders the state proceeding so fundamentally unfair as to violate due process" Bueno v. Hallahan, 998 F.2d 86, 87 (9th Cir. 1993). The state Supreme Court's holding that it was not error to admit the relevant testimony is conclusive as a matter of state law. Moreover, substantial evidence supported the jury's finding that Belmontes delivered the fatal blows, and the admission of this testimony did not render the trial fundamentally unfair.

Belmontes takes exception also to the trial court's use of

California jury instruction 2.11.5, which instructs the jury not to discuss or give any consideration to why other individuals who may have been involved in the crime were not on trial along with the defendant. Petitioner argues that the jury may have understood this instruction to forbid consideration of Bolanos' plea agreement in assessing his credibility. The challenged instruction could hardly have been understood as Belmontes suggests, however, in light of the other jury instructions, which clearly required the jury to view Bolanos' testimony critically in light of his plea bargain. The court cannot say that the challenged instruction rendered the trial fundamentally unfair, as would be required to grant habeas relief on this basis. See Foster v. Ward, 182 F.3d 1177, 1193 (10th Cir. 1999) (holding that instructional error is a ground for habeas relief only if it rendered the trial so fundamentally unfair as to cause a denial of due process).

8. Claim A-9

Petitioner argues that he was deprived of due process by the retroactivity regime applied to the California Supreme Court's decision in People v. Anderson, 43 Cal.3d 1104 (1987). Anderson overturned the earlier decision in Carlos v. Superior Court, 35 Cal.3d 131 (1983), which had held that the prosecution must prove intent to kill as an element of special circumstances liability. In cases following Anderson, the Supreme Court held that a defendant tried for felony murder with special circumstances between the decisions in Carlos and Anderson was entitled to an instruction and finding on intent to kill, but that defendants tried prior to Carlos were not. Petitioner, who was tried prior to Carlos, argues that this retroactivity regime violates due process. The Ninth Circuit, however, has repeatedly held that the retroactive application of the decision in Anderson does not violate due process. See, e.g., Hamilton v. Vasquez, 17 F.3d 1149, 1164 (9th Cir. 1994); Hendricks v. Vasquez, 974 F.2d 1099, 1107 (9th Cir. 1992). Moreover, even if a finding of specific intent were required, the jury here made one. See People v. Belmontes, 248 Cal. Rptr. at 154 n.18.

9. Claim A-13

Petitioner argues that two jury instructions given by the trial court, CALJIC 6.10.5 and 6.11, are defective in that they permit a finding of guilt without proof beyond a reasonable doubt. Specifically, if the jury rejected the premeditated murder and felony murder theories, it could nonetheless have found petitioner guilty of murder on a vicarious liability theory – on the belief that Vasquez committed the murder and that petitioner was liable as his coconspirator. Because the challenged instructions permit the jury to find the existence of an uncharged conspiracy and the defendant's membership in that conspiracy by a preponderance of the evidence, Belmontes argues, he could conceivably have been adjudged guilty of murder without every element having been proved beyond a reasonable doubt.

This argument is frivolous. That the jury did not rely on a conspiracy theory in convicting Belmontes is evidence from its special findings that Belmontes was guilty of intentional and premeditated murder.[15/]

10. Claim A-14

Petitioner argues that the trial court improperly refused to give requested instructions on lesser-related offenses that encapsulated petitioner's theory of the case. There is no federal due process right to instruction on lesser-related offenses.[16/] See Hopkins v. Reeves, 524 U.S. 88, 97, 118 s. Ct. 1985, 1901

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15. The jury found that petitioner personally and intentionally committed the killing, and that he was the actual killer, and rejected the only vicarious liability special finding that it was given – the allegation that Belmontes had intentionally aided, abetted or assisted in the killing.

16. Petitioner argues that there is a federal constitutional requirement that a court instruct the jury on a defendant's "theory of the case." (See 1995 Mem. in Supp. at 25-26.) The cases cited for this proposition, however, all pertain to instructions concerning a theory offered in defense, such as entrapment or alibi, not to instruction on lesser-related offenses.

(1998) (declining to extend rule of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382 (1979) from lesser-included offenses to lesser-related offenses). Although California formerly recognized a right to such an instruction, see People v. Birks, 77 Cal. Rptr. 2d 848 (1998). Even if instructions on lesser-related offenses were constitutionally required, the trial court's error in refusing them would be harmless, since, as the California Supreme Court noted, the record does not "support the possibility that the jury would have convicted defendant of the lesser-related offenses under the refused instructions." 248 Cal.Rptr. at 153.

As to the denial of petitioner's request for aiding and abetting instructions, their omission could not have prejudiced petitioner, because it is evident from the special findings that the jury found petitioner directly, and not vicariously, liable.

B. Penalty Phase

1. Claim B-1

Belmontes argues that he was deprived of due process and the effective assistance of counsel by trial counsel's failure to conduct a reasonably adequate mental state investigation, and by counsel's failure to present mental state evidence in mitigation in the penalty phase.

Belmontes' trial counsel, Mr. Schick, retained a psychiatrist, Dr. Cavanaugh, to evaluate petitioner as to issues relevant at the guilt phase, namely insanity, diminished capacity, and competency, but did not ask him to conduct any analysis of factors relevant to the penalty phase. (See Stmt. of Facts in Supp. of Mot. for Evid. Hearing Regarding Claim B-1 at 11:10-12:13.) Schick has acknowledged that his failure to seek expert opinion regarding mental state mitigation evidence was not a tactical decision, but that he "didn't really consider the use of a psychiatrist." (Id. at 12:19-13:4.) Belmontes argues that this failure on counsel's part deprived him of the effective assistance

of counsel.

To establish that counsel's failure to consider the use of a psychiatrist for the penalty phase deprived him of counsel in violation of the sixth amendment, Belmontes must satisfy the two-part test of Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing both that counsel's performance was unreasonable in light of prevailing professional norms, see id. at 687-88, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 695; see also Jackson v. Calderon, 211 F.3d 1148, 1154 (9th Cir. May 8, 2000). Strickland requires significant deference to trial counsel's strategic decisions, however. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066.

The record here shows that trial counsel pursued no investigation whatsoever into Belmontes' mental state for the penalty phase. Schick acknowledged that after consulting with Dr. Cavanaugh on competency, insanity and diminished capacity, he had no further contact with Dr. Cavanaugh, or with any other psychiatrist in relation to the penalty phase. (See Schick Depo. at 665:6-23, 667:9-24.) Under Strickland, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 690-91, 104 S. Ct. 16 2066. Even with such deference, however, it is clear on this record that counsel's decision not to pursue mental state mitigation evidence for the penalty phase was not a tactical one. (See, e.g., Schick Depo. at 665:6-23 ("I didn't really consider the use of a psychiatrist."). Counsel's failure to investigate mental state evidence for presentation at the penalty phase, even where

such evidence is unhelpful at the guilt phase, is not reasonable under Ninth Circuit precedent. See Jackson, 216 F.3d at 1162-63 (citing Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995)).

Belmontes is deemed to have suffered prejudice as the result of Schick's deficient performance only if he shows that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994). Thus, in order to determine whether Schick's failure to present certain evidence in mitigation might have affected the jury's decision, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." Bonin v. Calderon, 59 F.3d 815, 833-834 (9th Cir. 1995).

For the expert psychiatric testimony that could have been presented, Belmontes relies primarily on the testimony of Dr. James Missett, a forensic psychiatrist who examined Belmontes and researched his family history.[17] Dr. Missett identified thirteen "themes" that he believed might have been pursued as mitigation in the penalty phase:

1. Alcoholism and domestic violence by Fernando Belmontes Sr. against Belmontes' mother Carole;
2. Demeaning and discriminatory treatment of Fernando Belmontes, Sr. by the Salvaggio family from the outset of marriage and throughout petitioner's youth;
3. Circumstances of objective and comparative poverty during early childhood;
4. Positive youth achievements in Little League, Cadets, paper route, absence of any indicia of conduct disorder;

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17. Belmontes offers testimony of other psychiatric experts as to several of the themes identified by Missett, but concedes that the themes described by Missett encapsulate his theory. (See Petr.'s Mem. on Merits of Claims A-1 through A-4 and B-1 at 62.)

5. Onset of rheumatic fever at approximately age 10 and curtailment of activities; objective adversity accompanying repeated eruptions;
6. Subjective adversity, fears of premature death;
7. Depression as a consequence during teen home schooling years;
8. Anti-Hispanic racial attitudes in high school;
9. Break up of family, loss of home in 1977;
10. Teenage criminality and youth gang support;
11. Factors operative at the time of the offense, militating against premeditation - drugs, alcohol, organic brain dysfunction, Domingo Vasquez's position as instigator of the burglary;
12. Positive institutional adjustment - leader of group in YA fire camp, safety contributions to fire crew
13. Lack of future violence potential in prison - avoidance of violence at substantial personal cost.

(Petr.'s Mem on Merits of Claims A-1 through A-4 and B-1 at 64.)

Schick used nine witnesses to develop two principal themes on Belmontes' behalf in the penalty phase, the first related to Belmontes' sympathetic life history, and the second involving his potential for institutional adjustment if sentenced to prison. In the course of developing these themes, Schick introduced testimony as to most of the factual matters identified by Missett. As discussed in Part I.B.2, supra, as to family history, Belmontes' mother and maternal grandfather, and Belmontes himself testified in some detail to Belmontes' father's history of alcoholism and domestic violence to the relationship between the Salvaggios and the Belmontes family, to the family's poverty and Mrs. Belmontes' two divorces and their effects on Belmontes. In addition, they testified to some of petitioner's positive achievements in youth.[18/] It is unclear that testimony on

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18. Petitioner identifies certain positive achievements that he argues should have been presented to the jury, such as the fact that

Missett's tenth "theme" – petitioner's adolescent involvement with gang, would have been viewed by the jury as a mitigating factor rather than an aggravating factor.[19/]

As to Petitioner's potential for institutional adjustment and history of nonviolent behavior while institutionalized, Schick introduced substantial evidence of this "theme" as well. As discussed in Part I.B.2, supra, the Reverend Dale Barrett, who supervised the M-2 program, Don Miller, Barrett's assistant pastor, and the Haros, Belmontes' M-2 sponsor family, all testified that Belmontes benefitted from a structured environment and that he had participated actively and sincerely in the program. In addition, Barrett testified that Belmontes was "salvageable," and Miller testified that he expected Belmontes to be very helpful, if imprisoned, in counseling other inmates to avoid his mistakes.

Petitioner argues that, although the jury heard testimony on each of Missett's themes, expert testimony would have helped them to weigh it appropriately. But petitioner provides no reason to believe that the jury needed professional help, beyond defense counsel's argument, to understand evidence of petitioner's difficult childhood or prospects for institutional adjustment. Given that the pertinent facts were largely before the jury, the court is not persuaded that, had the jury heard the expert testimony identified by petitioner, "there is a reasonable probability that . . . the result of the proceeding would have been different." Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir.

Belmontes held a paper route, played Little League baseball, and dealt with racism at his high school. Introduction of these facts would nto have created a reasonable likelihood of a different result.

19. Missett's fifth and sixth themes pertain to the occurrence, and socially isolating effects, of Belmontes' childhood bout with rheumatic fever. While this evidence might have aroused some sympathy for Belmontes, the court does not find it reasonably likely that it would have produced a different result. The evidence of rheumatic fever does not present a substantially "different picture of [Belmontes] than any the jury was allowed to consider." Jackson, 211 F.3d at 1163.

1994).

Only Missett's eleventh "theme" merits further discussion. Where evidence of a defendant's mental state at the time of the crime tends to undermine a finding of premeditation, counsel's failure to investigate and present expert testimony regarding such evidence is particularly likely to be deemed Strickland error. See Jackson v. Calderon, 211 F.3d at 1163-64. A finding of error is particularly likely where, as here, the aggravating evidence presented to the jury is "far from overwhelming." See id. at 1164. There was evidence that petitioner had been consuming alcohol and amphetamines for four days prior to the murder, and had not slept during that time. Dr. Missett indicates that he would have testified "to a reasonable medical certainty" that under the circumstances, petitioner's ability to deliberate would have been substantially impaired. (See Petr.'s Stmt. of Facts in Suppl. of Claim B-1, docket no. 286, at 62:16-24.) Testimony of this sort, however, would have opened the door to introduction of the evidence discussed above regarding Belmontes' alleged execution-style murder of Jerry Harmon. Had petitioner argued that he would not have murdered Steacy McConnell but for his drug intoxication, evidence of Belmontes' prior premeditated murderous acts would have been admissible to rebut the inference that Belmontes' murder of McConnell was the result of unique circumstances and that he was ordinarily incapable of the deliberate taking of another life. (Cf. RT 2331:26-2335:12.) Thus, while the aggravating evidence actually presented to the jury did not make this a clear-cut case for application of the death penalty, had Schick presented the evidence now offered by petitioner, the prosecutor would most likely have been permitted to rebut the evidence with damning evidence of prior violent acts. Competent counsel would not have done anything to jeopardize the successful exclusion of the Herman execution style killing, which would have been the most powerful imaginable aggravating evidence. Thus, the court finds no reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

2. Claim B-2

Petitioner argues that he was deprived of due process by the trial court's exclusion, from the penalty phase of the trial, of evidence of the sentence imposed on Domingo Vasquez. Although the Supreme Court has held that the constitution requires some proportionality between the gravity of a defendant's crime and the sentence imposed, see, e.g., Payne v. Tennessee, 501 U.S. 808, 861, 111 S. Ct. 2597, 2628 (1991) ("proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"), it has not held that evidence of codefendants' sentences is constitutionally relevant evidence in mitigation. Belmontes provides no binding or persuasive authority for the novel proposition that a criminal defendant has a constitutional right to introduce evidence of the disposition of charges against codefendants.[20/] Accordingly, the trial court's exclusion of that evidence as potentially confusing to the jury did not violate Belmontes' due process rights.

3. Claim B-3

Belmontes argues that the trial court erred in its response to a juror's question about the jury's role in considering aggravating and mitigating factors, in violation of his constitutional right to have the jury consider all mitigating factors. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987).

Petitioner's claim is based on the following exchange between juror Hern and the trial court, which occurred after several hours of deliberation:

> Juror Hern: The statement about the aggravation and the mitigation of the circumstances, now, that was the listing?
> The Court: That was the listing, yes, ma'am.

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20. Belmontes relies primarily on a Florida Supreme Court case that held that Florida's death penalty statute requires admission of such evidence. See Messer v. Florida, 330 So. 2d 137, 141-42 (1976).

Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?

The Court: That is right. It is a balancing question.

(RT 2501:27-2502:06.)

Petitioner argues that juror Hern's comments reveal her misunderstanding of the constitutional obligation to consider non-enumerated mitigating factors, and that the trial court committed reversible error by reinforcing her impression. Hern, according to petitioner, saw the jury's role as considering the statutory list of aggravating and mitigating factors and tallying which were more numerous in petitioner's case. To prevail on this claim, Belmontes need not show that the jury more likely than not misunderstood its role. Rather, petitioner must show only "that there is a reasonable likelihood" that the jury misapplied the instruction in a way that prohibited consideration of constitutionally relevant evidence. See Boyde v. California, 494 U.S. 370, 370, 110 S. Ct. 1190, 1198.

A single instruction should not be read in isolation, but must be read in the context of the instructions as a whole and the entire record. Boyde, 494 U.S. at 383-84, 110 S. Ct. at 1199-2000. The court concurs with the Supreme Court of California that "the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities." Belmontes, 45 Cal.3d at 804-05, 248 Cal. Rptr. at 161. The jury was explicitly told that it could consider any mitigating factor and that a single mitigating circumstance on its own could support a non-death verdict. Moreover, neither the court's comments nor the juror's, in this brief exchange, suggests a misunderstanding or repudiation of these instructions.

4. Claim B-4

Petitioner argues that California's death penalty statute is unconstitutional as applied, in that it fails to provide the "guided

discretion" required by Gregg v. Georgia, 428 U.S. 153 (1976). Specifically, petitioner argues that California's statute is unique among all death penalty statutes in that it fails to guide the jury's discretion as to which factors are to be considered mitigating factors and which are to be considered aggravating. Belmontes provides no authority for the proposition that the constitution requires that each factor be statutorily identified as either mitigating or aggravating. In Tuilaepa v. California, 512 U.S. 967, 114 S. Ct. 2630 (1994), the Supreme Court rejected the argument that "the § 190.3 sentencing factors are flawed because they do not instruct the sentencer how to weigh any of the facts it finds in deciding upon the ultimate sentence." Id. at 978-79, 114 S. Ct. at 2638. Belmontes argues, however, that although Tuilaepa upheld the statute against a facial challenge, it does not foreclose an "as applied" challenge based on the prosecutor's suggestion here that Belmontes' youth was an aggravating, rather than a mitigating factor. Tuilaepa, however, forecloses precisely this argument:

> petitioners claim that a single list of factors is unconstitutional because it does not guide the jury in evaluating and weighing the evidence and allows the prosecution (as well as the defense) to make wide-ranging arguments about whether the defendant deserves the death penalty. This argument, too, is foreclosed by our cases.

Tuilaepa, 512 U.S. at 979, 114 S. Ct. at 2638. Moreover, as the California Supreme Court noted in rejecting this claim before Tuilaepa was decided, Belmontes waived this argument by failure to object at trial. See Belmontes, 45 Cal.3d at 806, 248 Cal. Rptr. at 162.

5. Claim B-5

Petitioner argues that he was deprived of due process and subjected to cruel and unusual punishment by the admission of evidence of unadjudicated prior misconduct. The instances of prior misconduct introduced at Belmontes' penalty trial included

(i) a 1979 altercation in a juvenile facility; (ii) a 1981 domestic dispute with petitioner's girlfriend; (iii) a 1979 incident in which petitioner allegedly stole a stolen gun from the original thief by pointing the loaded weapon at the man; (iv) a 1979 incident where petitioner indicated that he was armed and confident in his ability to protect himself; and (v) a prior no contest plea to accessory to manslaughter. Petitioner asserts that "these matters were erroneously admitted and constituted an unreliable basis for the penalty determination under federal constitutional standards."

This argument is meritless. There is no constitutional bar to the consideration, at the penalty phase, of unadjudicated prior instances of criminal misconduct. See McDowell v. Calderon, 107 F.3d 1351, 1366 (9th Cir. 1997), vacated in part on other grounds, 130 F.3d 833 (9th Cir. 1997) (en banc), ("The introduction of [unadjudicated criminal conduct] during the penalty phase of a capital case does not necessarily violate a defendant's rights under the Eighth or Fourteenth Amendments or render a death sentence unreliable."); see also United States v. Cooper, 91 F. Supp.2d 90, 107 (D.D.C. 2000) (citing cases).

The only incident the admission of which arguably constituted error was the 1979 conversation in which Belmontes indicated that he was not worried about himself because he was armed. As this was not a threat directed at any individual, it was not a criminal act under the California death penalty statute. The court agrees with the California Supreme Court, however, that in light of the other aggravating circumstances, most notably the brutality of the crime itself, there is no likelihood that the admission of testimony regarding that incident prejudiced Belmontes. See Belmontes, 45 Cal.3d at 809, 248 Cal. Rptr. at 164.

6. Claim B-7

Petitioner argues that he was deprived of due process and subjected to cruel and unusual punishment by "the trial court's refusal to adequately respond to the jury's question about the

consequences of their failure to agree on a penalty." (1995 Mem. in Supp. at 43.) During penalty deliberations, the jury foreman sent the judge a note inquiring about the consequences of a deadlock as to penalty, and specifically, whether a majority vote could suffice to decide on life imprisonment. The court reinstructed the jury regarding the requirement of a unanimous verdict, and indicated that he could not answer the question as to what would happen if they could not agree. (See 1995 Mem. in Supp. at 43 & Exh. D.) Petitioner argues that the constitution requires that jurors be informed as to what will happen in the event of deadlock, and that the jury may have imposed the death penalty out of fear that deadlock would result in petitioner's retrial or eventual parole.

In Jones v. United States, the Supreme Court held that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381, 119 S. Ct. 2090, 2098 (1999). Although the holding in Jones concerned the giving of such an instruction in every case as part of the standard instructions, the reasoning in Jones is equally applicable to the situation as here, where the jury makes inquiry.

7. Claim B-8

After the jury returned the death verdict, state law required the judge to consider an automatic motion for modification of the judgment. See Penal Code § 190.4(e). Petitioner argues that he was deprived of due process by "the trial court's pronounced prejudgment" of that motion. The trial court sent a letter to jurors several days after they rendered their verdict and several weeks before the hearing on the 190.4(e) motion, thanking them for their service, and promising that their death judgment "is acceptable and shall be followed." Petitioner observes that this letter is evidence that the trial court had prejudged the 190.4(e) motion, in violation of the court's statutory responsibility to make an independent review of the evidence and render an independent opinion as to the appropriateness of the death

penalty. (See 1995 Mem. in Supp. at 49-50.)

The California Supreme Court pronounced the offending remark "patently improper," but found that "defendant has not established that the trial judge ultimately failed to make the independent determination respecting the appropriateness of the penalty verdict, as he was obliged to do under section 190.4, subdivision (e)." Belmontes, 45 Cal.3d at 816, 248 Cal. Rptr. at 169.[21] The Court's finding was informed by consideration of the remark in the context of the letter in which it was made and in light of the trial court's explanation, which it found "credible" that it "was made for therapeutic purpose more than a legal purpose." Id. The Court remarked that "the [trial] court's thorough and detailed findings entered in the record reinforce our conclusion." Id. Assuming that the alleged failure to adhere to a state law requirement would violate Belmontes' federal constitutional rights, the California Supreme Court's conclusion that the trial court did render the required impartial judgment is entitled to deference as a factual finding.

III.

Petitioner's motion for summary judgment is DENIED. Respondent's motion for summary judgment is GRANTED. There appear to be remaining claims that were not the subject of these motions – claims A-8, A-10 through A-12, B-6, and B-9. Counsel shall submit a joint status statement within 14 days advising the court of the status of these claims and proposing a future schedule for the timely resolution of all remaining issues.

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21. In these circumstances, state law places the burden on Belmontes to rebut a presumption that an official duty such as the judge's duty to render an impartial ruling on the appropriateness of the death penalty has been satisfied. See Cal. Evid. Code § 664.

IT IS SO ORDERED.

Dated: _____.

_____

DAVID F. LEVI
United States District Judge

THE PEOPLE,
Plaintiff and Respondent,

v.

FERNANDO BELMONTES,
Defendant and Appellant

No. S004467, Crim. No. 22810.
Supreme Court of California.
Jun. 23, 1988.

SUMMARY

Defendant was convicted of first degree murder and burglary in the second degree. The jury returned special findings he personally committed the killing, and the murder was intentional, willful, deliberate, premeditated, and the result of the commission or attempted commission of the burglary. A special circumstance allegation under the 1978 death penalty law was found true: that the murder was committed while defendant was engaged in the commission or attempted commission of a burglary. The jury made additional special findings that defendant was the actual killer and had acted with specific intent to kill. The jury fixed the penalty at death; the trial court denied defendant's automatic motion to modify the verdict. The victim had been found beaten unconscious on the floor of her residence. She had died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head which cracked her skull. Defendant furnished three statements to investigators shortly after his arrest. In the second statement, he admitted involvement, claiming the incident was planned as a burglary with two accomplices; he admitted hitting the victim only once, knocking her to the floor. One accomplice pled guilty to burglary, received immunity from prosecution for the murder and testified for the People. (Superior Court of San Joaquin County, No. 32183, William R. Giffen, Judge.)

The Supreme Court affirmed. As to the guilt phase of trial, it held the trial court properly admitted defendant's pretrial statements, since no improper threats or promises of leniency were made to him by police investigators. Also, the trial court properly admitted evidence of a prior consistent statement of the girlfriend of the testifying accomplice, confirming that such accomplice told her that defendant had killed the victim. It also held the trial court was within its discretion in limiting cross-examination of the girlfriend, as to the disposition of the testifying accomplice's case. It further held the People were entitled to proceed on an alternative uncharged conspiracy theory of liability. It also held the jury properly made special findings in connection with the verdict of guilt of first degree murder, and with regard to the special circumstances found to be true. It further held the special circumstance finding of premeditation and deliberation was supported by the evidence.

As to the penalty phase, the court held the jury was adequately informed of the full nature of its responsibility to consider sympathy, and defendant's general character and background evidence. It also held the jury was adequately informed of the full nature of its sentencing responsibility, even though an instruction charged that it "shall" impose death if it found that aggravating circumstances outweighed mitigating circumstances. It further held the jury did not improperly consider the age of defendant at the time of the murder or his lack of remorse as aggravating factors. Although a juror had talked to a member of the victim's family during a break in the penalty phase and an alternate juror had talked to another family member, it held the presumption of prejudice was rebutted and no prejudice actually resulted. It also held the trial court did not err in excluding evidence of the pleas and negotiated dispositions of defendant's two accomplices. It held the trial court erred in sending a letter to the jurors, after they were discharged, indicating their decision was acceptable and would be followed, since the judge had not yet heard defendant's automatic motion for modification of the jury's death verdict; however, defendant did not establish that the judge failed to make the independent determination as to the

appropriateness of the penalty verdict. (Opinion by Eagleson, J., expressing the unanimous view of the court.)

COUNSEL

Eric S. Multhaup, under appointment by the Supreme Court, Jean R. Sternberg and Kathy M. Chavez for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Edmund D. McMurray, Robert D. Marshall, Jane N.[page 760] Kirkland, Michael T. Garcia and Jane L. Lamborn, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

EAGLESON, J.—

Defendant Fernando Belmontes was convicted of the first degree murder of Steacy McConnell (Pen. Code, § 187)[1/] and burglary in the second degree. (§§ 459-460.) The jury returned special findings that he personally committed the killing, and that the murder was intentional, wilful, deliberate, premeditated, and the result of the commission or attempted commission of the burglary. A special circumstance allegation under the 1978 death penalty law was found true: that the murder was committed while defendant was engaged in the commission or attempted commission of a burglary. (§ 190.2, subd. (a)(17)(vii).) The jury made additional special findings that defendant was the actual killer and had acted with specific intent to kill. The jury fixed the penalty at death; this appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

For the reasons set forth hereafter, we affirm the judgment in its entirety.

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1. All statutory references are to the Penal Code unless otherwise indicated.

I. GUILT PHASE

A. FACTS

Prosecution Case

On Sunday, March 15, 1981, the parents of 19-year-old Steacy McConnell found her beaten unconscious on the floor of her residence in Victor, several feet from the unlocked front door. She had telephoned them that same morning to advise that several people, including Domingo Vasquez, had been threatening her.

McConnell died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head which cracked her skull. The pathologist testified there would have been sounds "like a cracked pot" associated with the blows which fractured the skull, and blood would have splattered in a manner consistent with the blood patterns found on the door jambs next to where she was found. A single contusion on McConnell's right temple was caused by blunt trauma of lesser force and did not lacerate the skin. It alone would not have caused death and — if it had been the first blow — would not likely have caused unconsciousness. Numerous defensive bruises and contusions on her arms, hands, legs and feet evidenced a struggle. All wounds were consistent with having been made by the metal dumbbell bar in evidence at trial. McConnell's stereo components were missing. The lock on the rear bedroom door was broken in. The master bedroom was ransacked; traces of blood were found splattered on the walls, door jambs and a chest of drawers in that room.

Defendant was spending the weekend with Bobby Bolanos in Lodi.[2/] Both knew Domingo Vasquez, who was acquainted with

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2. On the date of the crime, defendant was on parole from the California Youth Authority and living in a halfway house in Stockton. The jury was not told of this fact at the guilt phase.

McConnell. During the week preceding the murder, Vasquez, Bolanos and others had "partied" at McConnell's house. Vasquez "ripped off" a quantity of amphetamine pills from her; the party ended with McConnell throwing Vasquez and his friends out of her house two days prior to the murder. The group subsequently discussed their general dislike of McConnell.

Bolanos, who pled guilty to burglary and received immunity from prosecution for the murder, testified for the People. On Sunday morning, he and defendant drove to Vasquez's residence in Bolanos's vintage black Chevy. Vasquez, who was talking on the telephone with McConnell when they arrived, shortly hung up and informed them that McConnell's parents were picking her up and she would not be home that day. Defendant was short of funds, having unsuccessfully tried to pawn a ring the previous week. Bolanos, a seasonal farmworker, was out of work. Vasquez was unemployed. The three men agreed to burglarize McConnell's residence, steal her stereo and "clean house." Defendant was wearing a baseball cap with its bill flipped up, Vasquez wore a stocking cap or beanie, Bolanos wore a checkered Pendleton shirt-jacket. Vasquez's girlfriend, Carrie Lynn Rogers, was present; she testified that as the men departed defendant picked up a steel dumbbell bar which he carried out with him.

Bolanos was the "wheel man" and never entered McConnell's residence; a role confirmed by defendant. En route to Victor, defendant suggested that he alone would approach the house on foot, using the metal bar if needed to force entry. Bolanos pulled over a short distance from the house; defendant left his wristwatch behind, concealed the bar under his jacket and walked to the residence. In accord with the plan, Bolanos and Vasquez waited several minutes, then drove up and backed into McConnell's driveway. Vasquez could not find the key to the trunk. As Bolanos got out of the vehicle to assist Vasquez, he heard repeated knocking or banging noises coming from within the house. They thought defendant was having trouble with the stereo. Vasquez entered to assist him. Bolanos remained in the

car, still hearing the rhythmic thumping sounds as Vasquez walked up to the front door.

Shortly, defendant and Vasquez emerged from the house carrying stereo components. Defendant alone was covered with blood sprinkled on his face, pants and shoes. Vasquez "looked like he had seen a ghost." Defendant informed Bolanos he had to "take out a witness" because she was home. He explained that McConnell heard Vasquez and Bolanos drive up, and that he hit her with the bar when she looked away from him, and continued to hit her approximately 15 more times.

Lucy Flores, McConnell's neighbor, observed a black Chevy with distinctive, wide taillights back into McConnell's driveway on the morning of her murder. A dark-complected man wearing a stocking cap got out of the passenger side and tried to unlock the trunk. He appeared to have difficulty with the lock, whereupon the driver, a male of Mexican or Italian ancestry, wearing a brown checkered shirt-jacket, got out of the car and unlocked the trunk. The driver got back in; the passenger walked towards the front of McConnell's house and met a third man. Flores did not see where the third man had come from. A short while later, she observed the two men hurriedly exiting from the back door of McConnell's house. The man in the stocking cap was carrying stereo speakers, the third man followed close behind carrying a stereo amplifier. They put the items in the trunk, got in the car and drove off.

Bolanos testified that en route to the nearby city of Galt to fence the stereo, defendant, who was wearing gloves, wiped blood off of the metal bar and his shoes. Defendant threw the bar out of the car window as they crossed a bridge over the Mokelumne river (Bolanos later led police to the location on the river bank from which the bar was recovered). The group went to the home of Manuel Vasquez, Domingo's brother, where defendant changed into a pair of clean pants. One Raul Barron was contacted; he met the three men at the home of Irma Vasquez, Domingo's sister, and purchased McConnell's stereo

components for $100. The stereo components were recovered and introduced into evidence; Barron testified he paid $100 for them to the man wearing the baseball cap who did most of the talking.

Later that afternoon Bolanos gave his girlfriend, Teresa Cobarrubio, $15 from his share of the proceeds from the sale of the stereo. Acting scared, he informed her that he, defendant and Vasquez had burglarized McConnell's residence. The following day Bolanos and Cobarrubio read a newspaper account of McConnell's murder. Cobarrubio testified that at that point Bolanos related further details of the crime, informing her that he had remained in his car outside of McConnell's house, and that defendant had exited from the house with blood all over his clothes, stating he had to "take a witness out."

On Monday, March 16, Vasquez called Bolanos in a panic to advise he had been questioned by police and did not want to "take the rap" for defendant. Bolanos and defendant went to Vasquez's house where the three sat in the living room discussing the murder. Carrie Lynn Rogers, Vasquez's girlfriend (who subsequently married him in jail — and who was a distant cousin to Bolanos) testified that from the kitchen she overheard the men discussing their sortie to McConnell's house, and heard defendant describe how he had first entered alone and hit McConnell several times with the bar, after which Vasquez had joined him in the house.

After the meeting, defendant telephoned his girlfriend, Barbara Murillo. Murillo testified that during the conversation defendant informed her he was "in trouble," relating that he had gotten into an argument with McConnell at her house, become angered and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep."

Belmontes fled to Southern California where he was arrested by Ontario police six days after the murder. Blood found on the tongue of one of his shoes was tested and found to be "type O"

— McConnell's blood type.

Defendant furnished three tape-recorded statements to investigators shortly after his arrest. In the first statement he denied any complicity in the crime, but inquired whether Bolanos or Vasquez had been taken into custody. In his second statement he admitted involvement; claiming the incident was planned as a "stupid little burglary." He had approached McConnell's house alone on foot; when she answered the door he entered and they just talked. He was not carrying the metal bar. When Bolanos drove up, defendant thought they would all talk a bit and leave. Instead, Vasquez came to the door and hit McConnell "two or three" times. They grabbed the stereo and ran.

In his third statement, defendant admitted he was armed with the dumbbell bar when he entered McConnell's house. After speaking with her for a few minutes, Vasquez arrived and pushed the front door open. McConnell immediately recognized Vasquez, who ordered defendant to "hit her." Defendant complied, hitting McConnell once in the head with the bar, knocking her to the floor. He proceeded to break down the rear bedroom door, search the closet, and remove the stereo components from the front of the house to Bolanos's car. He was not paying attention to Vasquez's actions during this period, and did not observe how the victim came to have suffered 15 to 20 fatal blows to her head.

Defense Case

The prosecution proceeded on actual malice-deliberation, vicarious liability (conspiracy) and felony-murder theories. Belmontes's defense was that he abandoned all intent to go through with the burglary once he knocked on the door and discovered McConnell at home. He only entered the house to "play it out." Although he struck McConnell the one blow with the bar, it was only at Vasquez's direction; he did not intend to kill her. Vasquez must have dealt the additional fatal blows to

McConnell while defendant was breaking into and searching the back rooms of the house.

Defendant testified in his own behalf. On Sunday morning, March 15, he and Bolanos went to Vasquez's house. Defendant had $7 remaining from his last paycheck and would not be paid again until April. Vasquez suggested they steal McConnell's stereo because she was a "snitch." Defendant had been to McConnell's house twice in the previous month. She was not a friend, however, and it meant nothing to him to "rip her off." He testified: "It was just something that came up. Everybody agreed on it, it happened. You can't tell what's going to happen from one day to the next."

They drove to Victor and parked a half block away from McConnell's house. The plan was for defendant to go to the door first, since McConnell would not let Vasquez or Bolanos inside but was unaware defendant knew them. Defendant, however, did not anticipate that McConnell would be home. Vasquez gave him the dumbbell bar to use to break a window. Defendant concealed it up his sleeve. Vasquez and Bolanos stayed in the car; defendant walked to McConnell's front door, knocked, and she answered. He told her he was hitchhiking and was stopping by because it was raining. McConnell invited him in. She noticed a bulge in his sleeve and asked what it was. Defendant showed her the bar, explaining he had it because he was hitchhiking; thereafter displaying it openly. He used McConnell's bathroom and then stood by the table and talked while she ironed clothes. She related that she was having problems with some people and asked him if he knew Domingo Vasquez. Defendant said he had met Domingo before.

Five minutes after defendant entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Defendant followed behind her and was placing the bar back up his sleeve when Vasquez rapped loudly on the door. According to defendant, the sequence of events was such that after pulling up Vasquez must have come directly to

the front door; he would not have had time to go to the trunk of Bolanos's car.

Vasquez pushed the door open, saw McConnell and ordered defendant to "hit her." Defendant followed Vasquez's directive and hit McConnell in the side of the head with the bar, using as much force as he could with a backhanded sweeping motion. She fell to the floor. Defendant dropped the bar, ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room, all within a matter of several seconds. He did not enter or ransack the master bedroom, testifying it must have been Vasquez. Upon returning to the front of the house, defendant observed Vasquez standing in the same spot holding the metal bar. He had not seen Vasquez hit McConnell nor heard any blows landing, because he was not paying attention. He could not explain the presence of defensive bruises and contusions on McConnell's hands and feet.

Defendant testified he was "mad" and "disgusted" because Vasquez was just "standing there like a fool" not doing anything while he was running around the house "looking for something to take." Defendant told Vasquez to grab something; Vasquez picked up a speaker. Defendant ripped out the stereo wires and antenna, put the second speaker on top of the stereo unit, and told Vasquez to run. Vasquez ran out the back door; defendant followed close behind.

They loaded the stereo components into the trunk. Vasquez got in the back seat, defendant rode "shotgun side," and Bolanos drove. En route to Galt, Vasquez handed defendant the steel bar which had flesh and hair residue on it, stating he had to take out a witness. Defendant, still wearing his gloves, wiped blood off the bar and set it down on the floorboard. He was uncertain whether there was blood on his pants when he left McConnell's house; some might have come off the bar when he placed it on the floorboard. He denied having wiped any blood off of his shoes. Bolanos and Vasquez told him to throw the bar out his window into the river; he complied.

The three drove to Vasquez's brother Manuel's house. Defendant changed into a pair of Manuel's pants. Manuel contacted Raul Barron, whom they met at Vasquez's sister Irma's house. Defendant backed the car into her garage and plugged in the stereo; Barron bought it for $100. Bolanos, Vasquez and defendant drove to Lodi, divided the money, bought some beer, then drove to the home of an acquaintance to purchase narcotics.

Defendant's girlfriend, Barbara Murillo, was questioned as a hostile witness by the defense. She and defendant were living together in Lodi shortly before the murder; at that time she had a two-year-old daughter by him and was pregnant with his second child. Six months after the murder she ran into Cobarrubio at the Grape Festival. Murillo believed defendant was the murderer. But when she asked Cobarrubio for further details about the crime, the latter claimed defendant had been "set up" because he had no backup in the area, while Vasquez had a network of local friends.

Cobarrubio was questioned on the matter. She recalled running into Murillo at the Grape Festival and being asked if defendant had committed the murder. She responded affirmatively. Murillo then asked Cobarrubio if she thought defendant "might have been set up." She replied: "Well, he might have." Cobarrubio testified further that in fact she had no information from any source that defendant had been set up. She had answered Murillo's inquiry to that effect because she knew defendant was protesting his innocence and felt sorry for Murillo, who seemed to still care about defendant.

B. GUILT PHASE ISSUES

Defendant raises a number of contentions relating to the issue of guilt. None, as we shall show, warrants reversal.

1. *Validity of the Arrest Warrant*

Defendant asserts the invalidity of his arrest warrant on two

grounds: (1) that it was facially invalid because it was based solely on the uncorroborated accusation of accomplice Robert Bolanos (see *People* v. *Campa* (1984) 36 Cal.3d 870 [206 Cal.Rptr. 114, 686 P.2d 634]); and (2) that material facts tending to negate the reliability of Bolanos's information were omitted from the affidavit in support of the warrant. (See *People* v. *Kurland* (1980) 28 Cal.3d 376 [168 Cal.Rptr. 667, 618 P.2d 213].) He argues that his bloodstained shoes and extrajudicial statements should have been suppressed as the fruits of his illegal arrest.

The arrest warrant was not challenged on these grounds in the trial court. "[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal [citations]." (*People v. Rogers* (1978) 21 Cal.3d 542, 548 [146 Cal.Rptr. 732, 579 P.2d 1048]; *People v. Easley* (1983) 34 Cal.3d 858, 869 [196 Cal.Rptr. 309, 671 P.2d 813]; see Evid. Code, § 353.) The contrary rule would deprive the People of the opportunity to make their record on the matter and cure the defect at trial. (*People* v. *Rogers, supra*, 21 Cal.3d at p. 548, and cases cited.) "Because of [his] failure to make a timely and specific objection on this ground ... the point must be deemed waived." (*People* v. *Green* (1980) 27 Cal.3d 1, 22 [164 Cal.Rptr. 1, 609 P.2d 468].)

While acknowledging trial counsel's failure to challenge the arrest warrant, defendant urges us to reach the merits of his claim on the ground that failure to do so constituted ineffective assistance of counsel. In order to establish such inadequacy, he must demonstrate that counsel failed to perform with reasonable competence, and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings. (*People* v. *Fosselman* (1983) 33 Cal.3d 572, 583-584 [189 Cal.Rptr. 855, 659 P.2d 1144]; *People* v. *Pope* (1979) 23 Cal.3d 412, 425 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) Defendant has failed to meet his burden. Our review is limited to consideration of the facts established by

the appellate record.

a. Reliability of Accomplice-informant Bolanos's Hearsay Statements

In *People* v. *Campa, supra*, 36 Cal.3d 870, we affirmed the trial court's determination that defendant's arrest was illegal because the affidavit in support of his arrest warrant failed to establish probable cause. There, a van had pulled alongside a car and, after a brief exchange of words between a passenger in the van and the driver of the car, the van passenger fired several shots into the car, wounding the driver and killing the passenger. Subsequent investigation led to one Richard Martinez, whose parents owned the van. Placed under arrest for murder and interrogated, Martinez admitted his participation in the incident, but stated Campa had done the actual shooting. A warrant was procured for Campa's arrest based upon Martinez's statement.

Since Campa's crime occurred prior to the adoption of Proposition 8, we applied principles of California constitutional law theretofore unimpacted by that initiative measure. (*People* v. *Smith* (1983) 34 Cal.3d 251, 262 [193 Cal.Rptr. 692, 667 P.2d 149].) We relied on *People* v. *Hamilton* (1969) 71 Cal.2d 176 [77 Cal.Rptr. 785, 454 P.2d 681], wherein we stated that "for an affidavit based on an informant's hearsay statement to be legally sufficient to support the issuance of a ... warrant, two requirements must be met: (1) the affidavit must allege the informant's statement in language that is factual rather than conclusionary and must establish that the informant spoke with personal knowledge of the matters contained in such statement; and (2) the affidavit must contain some underlying factual information from which the magistrate issuing the warrant can reasonably conclude that the informant was credible or his information reliable."[3] (*Id.*, at pp. 179-180.)

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3. In *Campa, supra*, 36 Cal.3d 870, we recognized that *Hamilton* and its progeny relied upon the "essentially identical two-part test" laid down by the United States Supreme Court in *Aguilar v. Texas* (1964) 378 U.S.

In *Campa* we concluded that accomplice Martinez's affidavit contained no factual information relative to his credibility — the second *Aguilar* prong, *supra*, 378 U.S. 108 — other than that he was himself in custody on a murder charge and had admitted his participation in the crime. We explained further: "This is not to say that in all such cases the statement of a coparticipant implicating a suspect in criminal activity should be disregarded in finding probable cause for issuance of a warrant. Admissions may be made under circumstances in which their credibility is enhanced. Other 'indicia of reliability,' such as ... corroborative evidence obtained independently may buttress the credibility of an arrestee's statement." (*Campa, supra*, 36 Cal.3d at pp. 883-884; see *People* v. *Scoma* (1969) 71 Cal.2d 332, 337-338 [78 Cal.Rptr. 491, 455 P.2d 419], and cases cited.)

Although the magistrate and parties below did not have the benefit of a reading of Campa, reasonably competent counsel at that time would have been familiar with the principles reiterated in this court's earlier cases which applied the *Aguilar-Spinelli* test. Here, the circumstances of the crime and evidence found at the crime scene — as summarized in the affidavit — corroborated Bolanos's statement. Bolanos asserted the murder was committed in the course of a burglary during which McConnell's stereo was stolen and later fenced — the affiant, Detective Holman, declared that the victim's house had been found ransacked. Bolanos stated defendant had beaten the victim with an iron bar causing

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108, 114 [12 L.Ed.2d 723, 728-729, 84 S.Ct. 1509], and *Spinelli v. United States* (1969) 393 U.S. 410, 413 [21 L.Ed.2d 637, 641-642, 89 S.Ct. 584]. However, we deemed the *Aguilar* test "a convenient shorthand articulation of previously established principles of California law in the area of hearsay affidavits." (*Campa, supra*, 36 Cal.3d at p. 880.) In *Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2d 527, 103 S.Ct. 2317], the Supreme Court abandoned the *Aguilar-Spinelli* "two-pronged test" and substituted a "totality-of-the-circumstances" analysis. Since McConnell was murdered prior to the effective date of Proposition 8 (June 9, 1982), we have no occasion to consider the effect, if any, of the United States Supreme Court's decision in *Illinois v. Gates* upon the facts of this case. (*Campa, supra*, 36 Cal.3d at p. 885, fn. 5.)

defendant to become splattered with blood — such was consistent with the nature of the victim's injury ("blunt trauma to the head") noted in the autopsy results incorporated into the affidavit.

Moreover, although defendant stresses that Bolanos had a self-serving interest in "pegging" him as the actual killer, all three participants in the burglary (defendant, Vasquez and Bolanos) shared felony-murder liability for McConnell's murder. In his statement, Bolanos confessed to his own role in the planning, participation and aftermath of the burglary; nothing therein suggested he had withdrawn from the criminal conspiracy at any time. Nor does defendant attempt to challenge the sufficiency of the affidavit to support his arrest under the warrant for *burglary*.

Mindful of the preference to be accorded warrants in doubtful or marginal cases (see *Campa, supra*, 36 Cal.3d at p. 884, and cases cited), trial counsel could reasonably have concluded that the affidavit contained sufficient corroboration of Bolanos's hearsay statement; that the arrest warrant thus issued on probable cause; and that a de novo motion to quash the warrant would have proved futile.[4/] Defendant has not met his burden of showing that failure to challenge the warrant on this ground amounted to ineffective assistance of counsel.

b. Omission of Material Facts From the Affidavit

Defendant argues there were four material omissions from the affidavit in support of the arrest warrant: (1) Deputy Holman had never heard the name Fernando Belmontes prior to Bolanos's

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4. We note that counsel did move to suppress the "fruits of defendant's arrest" on other grounds. Counsel sought exclusion of defendant's extrajudicial statements as involuntary; moved to suppress defendant's bloodstained shoes on the ground that their seizure was beyond the lawful scope of a search incident to arrest pursuant to warrant; and vicariously sought to suppress the fruits of Bolanos's statement to police on grounds that he was unlawfully detained, searched and arrested.

statement, although Vasquez was on the police list of people recently in contact with the victim; (2) the black Chevy described by Lucy Flores, McConnell's neighbor, was traced to Bolanos and impounded before he furnished his statement; (3) Bolanos had initially reacted to police questioning by lying and denying any knowledge of the crime; and (4) his eventual inculpatory statement was prompted not by good citizenship, remorse or a guilty conscience, but rather by the police confronting him with his girlfriend's incriminating statements.

Recognizing that the record is incomplete because this claim was not litigated in the trial court to determine whether the omissions were intentional, reckless or negligent, defendant nevertheless urges us to reach the merits of his claim because the omissions were negligent "as a matter of law." For reasons already noted, the point has been waived on appeal. (*People* v. *Green, supra*, 27 Cal.3d at p. 22.)

Nor was trial counsel incompetent in failing to attack the arrest warrant on this ground. Prior to the effective date of Proposition 8, Kurland applied. (*People* v. *Kurland, supra*, 28 Cal.3d 376; see *In re Lance W.* (1985) 37 Cal.3d 873, 896 [210 Cal.Rptr. 631, 694 P.2d 744]; compare *Franks* v. *Delaware* (1978) 438 U.S. 154, 155-156 [57 L.Ed.2d 667, 672, 98 S.Ct. 674].) Although Kurland speaks to search warrants, the test is equally applicable to omissions from arrest warrants. (*People* v. *Anderson* (1983) 149 Cal.App.3d 1161, 1164 [197 Cal.Rptr. 413]; see *People* v. *Sesslin* (1968) 68 Cal.2d 418, 424 [67 Cal.Rptr. 409, 439 P.2d 321].)

Counsel could competently have concluded that the omitted facts were either immaterial, or their omission reasonable. In either situation no sanction is imposed and, assuming the affidavit otherwise supports probable cause, the warrant usually stands. (*Kurland, supra*, 28 Cal.3d at pp. 387-388.) Omissions are "material" only if they rendered the affidavit substantially misleading, i.e., if there was "a substantial possibility [the omitted facts] would have altered a reasonable magistrate's

probable cause determination." (*Id.*, at p. 385.)

It is difficult to see how the officer-declarant's unfamiliarity with defendant would have borne upon *Bolanos's* reliability — the precise matter at hand. Nor did omission of the fact that Bolanos's Chevy was impounded shortly before he furnished his statement diminish its reliability. If anything, inclusion of the fact that his vehicle had been identified would have corroborated his claim that he drove the participants to the crime scene. Nor would Bolanos's truthful statement — furnished after he learned his girlfriend had incriminated him — necessarily have been more reliable had it been shown to be motivated by "good citizenship" or "remorse." Inclusion in the affidavit of the circumstance that Bolanos's statement conformed to his girlfriend's report to police of what he had told her about the crimes would also have further enhanced its reliability. Lastly, although Bolanos may have initially denied knowledge of or involvement in the crime, it was his own incriminating admissions in his statement, together with other corroborative facts in the affidavit, upon which the magistrate could justifiably rely in assessing the reliability of Bolanos's statement.

Defendant has failed to show a "substantial possibility" that inclusion of these facts in the affidavit would have altered the magistrate's determination of probable cause. He has thus not met his burden of demonstrating that failure to attack the warrant on this ground constituted ineffective assistance of counsel.

2. *Admission of Defendant's Extrajudicial Statements*

Defendant contends that his pretrial statements, in which he made inculpatory admissions of involvement in McConnell's murder, should have been suppressed as the involuntary products of threats and/or promises of leniency by the homicide investigators. Specifically, he condemns the officers' use of the "technique of invoking the threat of the death penalty and then offering the hope of leniency through the means of confession."

Six days after the murder, San Joaquin Detectives Elbert Holman and Lyle Cooper, armed with the arrest warrant, traveled

to San Bernardino County and took defendant into custody at his mother's home in Ontario. He was taken to the Ontario Police Department for questioning and advised of his *Miranda* rights (*Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 649,86 S.Ct. 1602, 10 A.L.R.3d 974]). Defendant acknowledged he understood his rights, waived them, and indicated his desire to speak with the officers. The waiver of rights and ensuing statement were tape-recorded.

In his first statement, defendant admitted knowing Bolanos, Vasquez and McConnell. He admitted having been to McConnell's house twice in January and February of that year. He had spent the previous weekend with Bolanos in Lodi. At first he claimed he had not been to Vasquez's house on the Sunday of the murder; thereafter he admitted having gone there. He claimed he had come to Ontario to be with his girlfriend. He denied having discussed burglarizing McConnell's residence while at Vasquez's house; being with Bolanos or Vasquez in Galt on Sunday morning; parking around the corner and walking to McConnell's house to break in; hitting her with the dumbbell bar as Bolanos and Vasquez were heard driving up; taking the stereo; attempting to throw the bar into the Mokelumne river; or selling the stereo in Lodi. When given an opportunity to ask questions, defendant wanted to know if Bolanos and Vasquez were already in custody, and was told they were in jail in Stockton charged with the murder. The interview was concluded and the tape recorder turned off.

Deputy Holman testified that after turning off the machine defendant was told they would be going back to Stockton. Holman stated to defendant: "Thanks for lying to me." When defendant expressed surprise, Holman added: "Why do you think we came down here and got you by name if we didn't know the story prior to coming down here?" Defendant asked for a minute to think about it, then indicated he wanted to "tell [Holman] what

had happened." Holman advised defendant he would not continue taking the statement unless the tape recorder was turned back on, and this was done. Less than three minutes had elapsed since the conclusion of the first statement. Holman testified he did not recall either he or Deputy Cooper ever mentioning to defendant, in the two or three minutes that the tape recorder was turned off, that "this was a death penalty case." He recalled Deputy Cooper telling defendant that "the whole case was lying on him"; which Holman felt accurately characterized the status of the investigation up to that point. Holman never told defendant they had him "dead to rights"; it was defendant who had first used that expression.

Deputy Cooper testified that during the break between statements, Holman told defendant he would be going back to Stockton to stand trial, that it was "a homicide case," that "he would have a long time to think about it," "and he may have even been told it was a — in our estimation a death penalty case. I don't recall if we told him that. [¶] I believe he was told there was no bail, again. That's about the extent of it. It was a very short conversation." Cooper testified that if the term "death penalty" was mentioned, it was not intended to scare defendant. Finally, his comment to defendant that "you want to clear it up so that its not all laying [*sic*] on you" was merely a reference in context to defendant's own earlier exclamation to that effect.

The transcript of the second tape-recorded statement supports the officers' testimony. Defendant indicates therein that Holman had not coerced him into making a second statement by use of the term "dead to rights"; that he had not been threatened or promised anything to make a second statement; that less than three minutes had elapsed since the tape recorder had been turned off; and that he had volunteered during the break that he had not been truthful in the first statement and now desired to level with the officers.

In his second statement — which defendant testified he

furnished "because only three people knew what had happened, yet the deputies seemed to know everything" — defendant claimed the incident was planned as a "stupid little burglary." He approached McConnell's house alone on foot; when he knocked and found her home he entered and they talked. He was not carrying the metal bar. When Bolanos drove up, he thought they would all talk some more and leave. Instead, Vasquez came to the door and hit McConnell "two or three" times. They grabbed the stereo and ran. The rear bedroom was never ransacked. Bolanos and Vasquez told him to throw the bar out the car window. He got some blood on his pants but thought Vasquez did too.

Defendant's third tape-recorded statement was taken on the following day in the San Joaquin County jail. He was again *Mirandized*, waived his rights, and does not here challenge the voluntariness of that statement on separate grounds. He admitted therein to being armed with the dumbbell bar upon entering McConnell's house. After speaking with her for a few minutes, Vasquez arrived and pushed the front door open, McConnell immediately recognized him, Vasquez ordered defendant to "hit her," and defendant complied. He claimed he hit McConnell only once in the head with the bar, knocking her to the floor. He proceeded to break down the bedroom door, search the closet, then remove the stereo components from the front of the house to Bolanos's waiting Chevy. Defendant stated he did not pay attention to Vasquez's actions during this period, nor did he directly observe how McConnell came to have suffered the 15 to 20 fatal blows to her head.

The burden is on the prosecution to prove the voluntariness of a confession beyond a reasonable doubt. (*People* v. *Murtishaw* (1981) 29 Cal.3d 733, 753 [175 Cal.Rptr. 738, 631 P.2d 446]; *People* v. *Jimenez* (1978) 21 Cal.3d 595, 608 [147 Cal Rptr. 172, 580 P.2d 672].) That requirement applies equally to a defendant's incriminating admissions. (*Murtishaw, supra*, 29 Cal.3d at p. 753.)

It is well settled that "mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*Jimenez, supra*, 21 Cal.3d at p. 611.) As we stated in *People* v. *Hill* (1967) 66 Cal.2d 536 [58 Cal.Rptr. 340, 426 P.2d 908], the distinction between permissible and impermissible police conduct "does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by the defendant if he speaks the truth as represented by the police." (*Id.*, at p. 549.) In terms of assessing inducements assertedly offered to a suspect, "'[w]hen the benefit pointed out by the police ... is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made [citation]." (*Jimenez, supra*, 21 Cal.3d at pp. 611-612.)

Our role as a reviewing court is "'"to examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found ...." [Citations.]'" (*People* v. *McClary* (1977) 20 Cal.3d 218, 227 [142 Cal.Rptr. 163, 571 P.2d 620].) If there is "conflicting testimony, the court must 'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation.]" (*People* v. *Hogan* (1982) 31 Cal.3d 815, 835 [183 Cal.Rptr. 817, 647 P.2d 93].)

Our independent review convinces us that no improper threats or promise of leniency were made to defendant. Deputy Holman testified that he did not, as defendant contends, "threaten him with the death penalty." Deputy Cooper's best recollection was that the term "death penalty" *may* have been mentioned at some point, but that if it was, it was not done so with intent to scare or coerce defendant into confessing. To the extent their testimony conflicted on whether the "death penalty" was ever mentioned, we must accept that version most favorable to the People. (*People* v. *Hogan, supra*, 31 Cal.3d at p. 835.)

Moreover, defendant's own responses at the beginning of his

second tape-recorded statement support the officers' testimony that he was not "threatened" with the death penalty, nor were any promises of benefit or leniency offered as inducement for his statements. Belmontes acknowledged he lied in all three of his statements to police. He testified his intent during the first statement was to deny everything: "I was holding my mug." His intention in his second statement was to tell enough of the truth so that he would be believed, but no more than necessary. Defendant's own behavior and testimony virtually precludes a conclusion that his free will was overborne by the substance or manner of the interrogation. (See *People* v. *Johns* (1983) 145 Cal.App.3d 281, 292-293 [193 Cal.Rptr. 182].)

Nor does the record support defendant's further assertion that the officers unduly coerced his statements by falsely suggesting that Vasquez and Bolanos were claiming he was the lone murderer because he was not a "home boy." At the time of defendant's questioning, Bolanos and Vasquez were in custody for the murder, and Bolanos had related that defendant went into the house first and thereafter came out with blood on him. Based upon the information they had at that point, it was reasonable for the officers to suspect defendant as the actual killer. Defendant acknowledged that it was the factual detail revealed in the officers' questions which led him to conclude that Vasquez and Bolanos had "snitched him off."

Applying the applicable standards to the facts, we conclude that the trial court properly ruled the statements admissible.

3. *Defense Counsel's Potential Conflict of Interest*

One week after the filing of the information and prior to severance, the public defender, representing codefendant Vasquez, filed a motion to recuse defendant's trial counsel, John Schick, on grounds of an alleged conflict of interest stemming from Schick's "prior representation" of Vasquez. Schick was a named partner in the law firm which prior to 1980 had been

under contract as the conflict public defender for San Joaquin County. Two years earlier, another attorney in Schick's law firm had represented Vasquez on another murder charge. That case never went to trial; the charge against Vasquez was ultimately dismissed.

In opposing his recusal, Schick filed a declaration in which he stated (1) that he was not in possession of any information relating to this case obtained through any confidential communication with Vasquez; (2) that he had made no personal appearances on behalf of Vasquez; and (3) that the office file on Vasquez's 1979 case had been destroyed over eight months earlier. At the hearing on the motion, Schick further represented that the attorney who had represented Vasquez in 1979 was no longer employed in his firm and was in private practice in Manteca. Vasquez's counsel conceded that "[c]ertainly if there were to be a severance granted, then that would go a long way towards clearing up those [potential conflict of interest] kinds of problems. But at this point as the District Attorney indicated, that is not necessarily the case. So I feel the problems are still there."[5/]

The court denied the motion to recuse Schick, concluding that under the circumstances there was no conflict of interest nor the potential for one to arise. Defendant was present and heard counsel's representations and arguments at the hearing. At its conclusion, defendant was asked: "Do you wish and is that still your desire to have [Schick] represent you?" Defendant responded, "Yes."[6/]

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5. Defendant's and Vasquez's cases were thereafter severed on August 31, 1981.

6. In a related matter, the court granted Vasquez's motion to recuse an investigator whom Schick had hired to work on Belmontes's case, because the investigator was still employed in the public defender's office on a part-time basis at the time Schick retained his services. In so ruling, the court stated it "was satisfied without any question ... [the investigator] did not have any information or was not privy to any that would have been of conflict in any way in this particular case." The investigator was nevertheless recused "[s]o there wouldn't be any thought he might have information that

Defendant argues that reversal is required due to a conflict or potential conflict of interest arising from Schick's law firm's prior representation of Vasquez.

"It has long been established that 'the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.' (*Glasser v. United States* (1942) 315 U.S. 60, 70 [86 L.Ed. 680, 699, 62 S.Ct. 457]; accord *People* v. *Chacon* (1968) 69 Cal.2d 765, 774 [73 Cal.Rptr. 10, 447 P.2d 106, 34 A.L.R.3d 454].)" (*Leversen* v. *Superior Court* (1983) 34 Cal.3d 530, 536-537 [194 Cal.Rptr. 448, 668 P.2d 755].) Although the classic conflict situation involves joint representation of codefendants in the same action, "[t]he same principles apply when counsel represents clients whose interests may be adverse even when they are not codefendants in the same trial. [Citations.]" (*People* v. *Mroczko* (1983) 35 Cal.3d 86, 105 [197 Cal.Rptr. 52, 672 P.2d 835].)

"When a trial court undertakes to appoint counsel for indigent codefendants (see *People* v. *Chacon* [1968] 69 Cal.2d 765 [73 Cal.Rptr. 10, 447 P.2d 106, 34 A.L.R.3d 454]), it must assume the burden of assuring that its appointment does not result in a denial of effective counsel because of some possible conflict. [Citations.]" (*People* v. *Cook* (1975) 13 Cal.3d 663, 671 [119 Cal.Rptr. 500, 532 P.2d 148], cert. den. (1975) 423 U.S. 870 [46 L.Ed.2d 100, 96 S.Ct. 135]; *Maxwell* v. *Superior Court* (1982) 30 Cal.3d 606, 612 [180 Cal.Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333].) Where the evidence conflicts "concerning the nature and extent of the past and present attorney-client

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in some way came to him later."

In connection with that ruling, the court had again asked defendant if he "wanted other counsel based on [the investigator's] employment," to which he replied: "No, I'll stay with the lawyer I have."

relationship, the trial court's findings based upon such conflicting evidence are conclusive on appeal. [Citations.]" (*People* v. *Yorn* (1979) 90 Cal.App.3d 669, 674 [153 Cal.Rptr. 295].)

We have held that "even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." (*People* v. *Mroczko, supra*, 35 Cal.3d at p. 105.) But "[p]ermissible speculation giving rise to a conflict of interest may be deemed an informed speculation ... only when such is grounded on a factual basis which can be found in the record." (*People* v. *Cook, supra*, 13 Cal.3d at pp. 670-671.)

Here the record does not establish an actual or potential conflict of interest. Attorney Schick, an officer of the court, "'"[was] in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." [Citation.]'" (*People* v. *Mroczko, supra*, 35 Cal.3d at p. 112.) He represented to the court that he personally had no prior contact with Vasquez. The attorney from Schick's firm who had handled Vasquez's earlier case was now in private practice in another locale; the file in that case had long since been destroyed.

Alternatively, defendant urges that Schick's ethical obligations to his firm's former client precluded him — perhaps subliminally — from fully exploiting Vasquez's prior criminal record in the presentation of Belmontes's defense. At oral argument appellate counsel suggested that Schick might have "self-censored himself" as a result of the conflict; at another point counsel took an opposite tack, suggesting Schick "didn't see the potential for conflict."

Trial counsel's performance, however, lends little support to the argument. Throughout the guilt and penalty phases Schick characterized Vasquez as the "ringleader" of the planned crime, emphasizing that Vasquez was older than defendant, and urging the jury to consider Vasquez's reputation in the local community;

his infidelity and mistreatment of Carrie Rogers who was supporting him; his former relationship with the victim; his threats to her right up through the morning of the murder; and his motive — consistent with defendant's claims — to do harm to McConnell, who had thrown him out of her house after he "ripped her off" several days prior to the murder. Further evidence of Vasquez's prior "specific instances of violent conduct," especially an earlier *charge* (the 1979 murder charge) *which had been dismissed*, would have been inadmissible to prove his conduct in the instant criminal episode. (Evid. Code, § 1101, subd. (a); Witkin, Cal. Evidence (2d ed. 1966) § 324, p. 287.) Moreover, given that the prosecution was proceeding on felony murder and conspiracy theories of vicarious liability, trial counsel had to weigh the tactical disadvantages of having the defense strengthen the case against Vasquez, thereby enhancing defendant's vicarious liability for Vasquez's criminal acts in the jurors' eyes.

The record affords no informed basis for concluding that a conflict of interest existed or affected trial counsel's performance to defendant's detriment.[7]

4. *Admissibility of Bolano's and Cobarrubio's Prior Consistent Statements*

Defendant contends that evidence of prior consistent statements of Bolanos and his girlfriend, Teresa Cobarrubio, were erroneously admitted without meeting the foundational requirements of Evidence Code sections 791 and 1236.[8]

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7. In so concluding, we need not reach defendant's further claim that his waiver of the potential conflict of interest was not a knowing and informed one.

8. Section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."
Section 791 provides: "Evidence of a statement previously made by a

Bolanos testified that he told Cobarrubio on the day after the murder defendant was the one who had killed McConnell during the burglary. No timely objection having been made to this testimony; the point has been waived on appeal. (*People* v. *Cannady* (1972) 8 Cal.3d 379, 388 [105 Cal.Rptr. 129, 503 P.2d 585]; *People* v. *Green, supra*, 27 Cal.3d at p. 22.) Defendant's purported citation to an objection on this point is unavailing. The "objection" he notes in the record went to Bolanos's testimony on a different matter (his initial false statement regarding the disposal of McConnell's stereo); was made on a nonhearsay ground; and was raised well beyond the point at which Bolanos gave the testimony here challenged.

Cobarrubio's testimony confirmed that Bolanos told her defendant had killed McConnell. This time there was an objection; to which the prosecutor responded: "We're offering it as a prior statement of Mr. Bolanos, given at a time when the motive imputed to him for why he should want to lie didn't exist."

One motive for fabrication or bias in Bolanos's testimony, explored at length during his cross-examination, was his favorable immunity agreement obtained in exchange for his testimony at defendant's trial. Defendant himself recognizes: "Of course Bolanos also had a strong motive to shift as much legal and moral culpability away from himself and on to the others [Belmontes and Vasquez] as well."

Bolanos had not yet been granted immunity from prosecution

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witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
"(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statment was made before the alleged inconsistent statement; or
"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated ... and the statement was made before the ... motive for fabrication ... is alleged to have arisen."

for the murder at the time he related the prior statement — consistent with his trial testimony — to Cobarrubio. An immunity agreement has been recognized as a motive for bias within the meaning of Evidence Code section 791. (*People* v. *Pic'l* (1981) 114 Cal.App.3d 824, 862-863 [171 Cal.Rptr. 106].) "That there may always have existed another motive for fabricating did not deprive the prosecution of its right to show that a motive shown by the evidence did not affect the witness' testimony [citation]." (*People* v. *Cannady, supra*, 8 Cal.3d at p. 388.) Bolanos's prior consistent statement to Cobarrubio was thus admissible under Evidence Code section 791, subdivision (b).

Lastly, Deputy Gary Coffey testified about the statement he took from Cobarrubio prior to Bolanos's questioning and arrest. There was a hearsay objection; the prosecutor responded that evidence of Cobarrubio's prior statement was "being offered to rehabilitate her, after counsel suggested she was lying on the stand. ..."

Counsel impeached Cobarrubio on cross-examination with her statement to defendant's girlfriend, Barbara Murillo, made several months after the crime, to the effect that she might have agreed with Murillo that defendant could have been "set up." This statement was inconsistent with Cobarrubio's trial testimony. Evidence of her earlier statement to Deputy Coffey was inconsistent with her statement to Murillo — consistent with her trial testimony — and thus admissible as a prior consistent statement. (Evid. Code, §§ 791, subd. (a) & 1236.)

5. *Curtailment of Impeachment of Prosecution Witness Carrie Lynn Rogers*

Defendant argues that the court improperly restricted his cross-examination of prosecution witness Carrie Lynn Rogers regarding her motive for bias and fabrication.

On the date of the offense, Domingo Vasquez was living with Rogers, their daughter, and a friend, Laura Hernandez. Rogers

subsequently married Vasquez in jail three months after his arrest for McConnell's murder. Vasquez's motion to dismiss the felony-murder-burglary special circumstance as to him was granted. He ultimately pled guilty to second degree murder and second degree burglary and was sentenced to an indeterminate term of 15 years to life.

Rogers did not come forward to implicate defendant as the actual killer until shortly before the start of his trial. On direct examination, she testified that after the crime Vasquez refused to tell her why he had been picked up for questioning by the police. On the night following the murder, while in her kitchen, she overheard defendant discussing the murder with Vasquez and Bolanos in the living room, and heard defendant review how he had first entered McConnell's house alone and hit her several times with the bar, after which Vasquez had joined him in the house.

Prior to Rogers's cross-examination, defense counsel moved for permission to question her about the disposition of Vasquez's case. The theory of relevance was that Rogers's belated claim that defendant was the killer was motivated by her desire to promote her husband's chances for early release on parole. Defendant asserts that "[t]he indeterminate sentence disposition of Domingo Vasquez's case and the wide range of potential prison confinement provided Carrie Rogers Vasquez with a powerful motive to portray [defendant] as the ringleader and killer. An early release — or indeed any release — of Vasquez depends in large measure upon his involvement in the offense and his level of culpability. Mrs. Vasquez could well be expected to so understand, believe or hope. The jury was deprived of powerful impeachment evidence."

The prosecutor countered that there was undue potential for prejudice and misuse of the information,[9] and that counsel's

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9. The jury was not told of Vasquez's negotiated plea to second degree murder, since the plea did not necessarily admit his role as the actual

theory of relevance for impeachment was highly speculative. The court prohibited cross-examination in this vein.

We recognize that "'[w]hile the trial judge has broad discretion to control the ultimate scope of cross-examination designed to test the credibility or recollection of a witness (*People* v. *Burton* (1961) 55 Cal.2d 328, 343 [11 Cal.Rptr. 65, 359 P.2d 433]) ...'" (*Jennings* v. *Superior Court* (1967) 66 Cal.2d 867, 877 [59 Cal.Rptr. 440, 428 P.2d 304]), "wide latitude" should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case. (*Curry* v. *Superior Court* (1970) 2 Cal.3d 707, 715 [87 Cal.Rptr. 361, 470 P.2d 345].) Nevertheless, we are unpersuaded by defendant's argument that the ruling was so unduly restrictive as to violate his Sixth Amendment right of confrontation.

In *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684, 106 S.Ct. 1431], the United States Supreme Court reaffirmed that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.' *Davis* v. *Alaska* [(1974) 415 U.S. 308, 94 S.Ct. 1105], at 318."

"But *Van Arsdall* emphasized that a trial judge has broad latitude in restricting cross-examination which is repetitive or only marginally relevant. (*Id.* [475 U.S. 673, 679-680].) There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a

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killer, could have been based on felony-murder-accomplice liability, and thereby could have served to enhance the prosecution's case against defendant. Evidence of Vasquez's disposition (an indeterminate prison term) was irrelevant to a determination of defendant's degree of participation or role in the crimes.

significantly different impression of [the witness's] credibility. ...' (*Id.* [475 U.S. 673, 680].) If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution case. (*Id.* [475 U.S. 673, 684].)" (*People* v. *Rodriguez* (1986) 42 Cal.3d 730, 751, fn. 2 [230 Cal.Rptr. 667, 726 P.2d 113].)

Here the jury learned Rogers had been with Vasquez for eight years and had married him shortly after his arrest for McConnell's murder; that they had a daughter together; that she was seeing Vasquez on a weekly basis at the time of trial; that she had been living with Vasquez and supporting him on the date of the murder; that she knew Vasquez was keeping company with other women at that time and nonetheless "didn't do anything about it"; and that she did not come forward to report her information inculpating defendant as the killer until the eve of his trial. Nor did the prosecutor in his closing argument make any attempt to clothe Rogers with a false aura of veracity.[10/]

We conclude the trial judge was within his discretion in ruling that the proffered line of cross-examination was potentially

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10. The prosecutor conceded in his opening argument: "[C]ounsel has suggested to you [Rogers] has a very definite interest in protecting a man, Domingo Vasquez, with whom she lives. Certainly, ladies and gentlemen of the jury, somebody that would marry someone who's been involved in something like this, when he's been cheating on her and she knows about it, that's loyalty. What else can you call it? [¶] And you have to take that into account in deciding whether to believe [Rogers]. Let's face it. That really calls into question her story." Defense counsel picked up the thread in his own closing argument: "Carrie Rogers — and I certainly would second [the prosecutor's] comments about Carrie Rogers' motives to come in here and lie for a man who she has certainly stood by through thick and thin who certainly has not stood by her." And in his closing argument, the prosecutor invited the jury to discount Rogers's testimony "because she is loyal to Domingo."

prejudicial and would not reasonably have produced "a significantly different impression of [Rogers's] credibility. ..." (*Van Arsdall, supra*, 475 U.S. at p. 680 [89 L.Ed.2d at p. 684].) Even were we to assume error of constitutional magnitude, given the totality of circumstances under which Rogers's testimony was presented — particularly defendant's own testimony that he struck

McConnell at least the one blow with the bar — no prejudice warranting reversal would be shown.

6. *Conflicting Instructions on Evaluation of Accomplice Testimony*

Defendant acknowledges that the court gave the full panoply of standardized instructions advising the jury that Bolanos was an accomplice as a matter of law (CALJIC No. 3.16); defining "accomplice" (CALJIC No. 3.10); and advising that his testimony had to be viewed with distrust (CALJIC No. 3.18) and needed corroboration (CALJIC Nos. 3.11 and 3.12). Defendant claims, however, that the purpose of these instructions was undermined to his prejudice by the giving of CALJIC No. 2.27, which allows the jury to find any fact on the testimony of one witness, and CALJIC No. 2.11.5, which cautions the jury against speculation as to the prosecution or nonprosecution of accomplices.

a. CALJIC No. 2.27

CALJIC No. 2.27 was requested *by defendant*. Trial counsel never proposed that it conflicted with the accomplice testimony corroboration requirement. Nevertheless, since the corroboration requirement of section 1111 is a "substantial right" we shall address the claim. (§ 1259; *People* v. *Chavez* (1985) 39 Cal.3d 823, 830 [218 Cal.Rptr. 49, 705 P.2d 372].)

In *Chavez, supra*, we held that the giving of CALJIC 2.27 in conjunction with accomplice instructions was not error per se, but we agreed with the suggestion of the Court of Appeal in

People v. *Stewart* (1983) 145 Cal.App.3d 967, 975 [193 Cal.Rptr. 799], that it should contain an explicit reference to testimony requiring corroboration. (*Chavez, supra*, 39 Cal.3d at p. 831.)

As in *Chavez*, here, looking to the instructions as a whole we find no error. (*Id.*, at pp. 830-831.) Both the prosecution and the defense proceeded on the premise that corroboration was needed. (*Id.*, at p. 831.) The prosecutor reiterated in his closing argument that Bolanos's testimony needed to be corroborated, cautioned that it must be viewed with distrust, and summarized the evidence which he believed would support defendant's guilty verdicts independent of Bolanos's testimony. Bolanos himself conceded that he was testifying because: "I'm ordered here or else that murder case would be up on me again if I'm not here," and acknowledged that he was more concerned about his own fate than that of defendant or Vasquez.

Moreover, the record belies defendant's assertion that Bolanos's testimony "went almost completely uncorroborated." It was corroborated by the testimony of Lucy Flores, Carrie Rogers, defendant's girlfriend Barbara Murillo, and crucially, by defendant himself. He admitted, both in his extrajudicial statements and trial testimony, that he first entered McConnell's house alone; dealt her the first blow with the iron bar; implored Vasquez to grab the stereo components and run; exited with blood on his clothes; wiped blood off the bar; and threw it in the river. He confirmed Bolanos was the "wheel man" and never entered the house. The murder weapon, recovered with Bolanos's assistance; defendant's bloodstained shoe; the number and severity of McConnell's head wounds; and the autopsy physician's testimony (that infliction of the blows would have made sounds like "a cracked pot"); all further corroborated Bolanos's account of the crimes.

We conclude there was no prejudicial error from the giving of unadorned CALJIC No. 2.27.

b. CALJIC No. 2.11.5

CALJIC No. 2.11.5 instructs: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which defendant is on trial. [¶] You must not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted."

There is no merit to defendant's claim that, so charged, the jury might have believed it was prohibited from considering the "nonprosecution" of Bolanos. The instruction was patently directed at Vasquez. The jury knew Bolanos had pled guilty to burglary, was awaiting imposition of sentence therefor, and had been granted immunity from prosecution for McConnell's murder. Defendant's suggestion that the jury might have understood CALJIC No. 2.11.5 as applying to Bolanos, thereby precluding them from weighing the existence or nonexistence of bias, interest or other motive in assessing his credibility (see CALJIC No. 2.20), is implausible. It would require us to find that the jury rejected nearly all of the accomplice testimony instructions and disregarded as irrelevant counsel's considerable efforts to impeach Bolanos in his cross-examination and closing argument.

Defendant further argues that the instruction "might have misled the jury into believing that Vasquez was not being prosecuted, although they could not consider why." He hinges this contention on the predicate in the instruction: "You must not discuss or give any consideration as to why [a possible accomplice] is not being prosecuted in this trial. ..." In doing so he ignores the concluding clause of the instruction, which states: "or whether he has been or will be prosecuted." The instruction in its entirety itself defeats his claim.

7. *Instruction on Defendant's Failure to Deny or Explain Certain Evidence (CALJIC No. 2.62)*

The jury was instructed with CALJIC No. 2.62 (1980 rev.), which pertains to the inferences that might be drawn from defendant's failure to explain or deny prosecution evidence of facts within his personal knowledge. "It correctly explained that defendant has a constitutional right to decline to testify, but that his failure to deny or explain facts within his personal knowledge

may be considered as supporting the prosecution evidence at issue. It also correctly advised that such failure to deny or explain does not create any presumption or warrant any inference of guilt, or relieve the prosecution of its proof burden." (*People* v. *Ghent* (1987) 43 Cal.3d 739, 763 [239 Cal.Rptr. 82, 739 P.2d 1250].) There was no objection to the instruction.

Defendant contends that "[t]he instruction in conjunction with the prosecutor's argument constituted prejudicial error because (1) the record discloses that [defendant] did *not* fail to explain or deny any prosecution evidence; and (2) the purported failures to explain or deny argued by the prosecution were tangential, collateral and of little importance."

We disagree on both counts. Defendant testified he heard Bolanos and Vasquez drive up, and that Vasquez came right to the front door and would not have had time to open Bolanos's trunk. But as the prosecutor argued, defendant failed to explain Bolanos's conflicting testimony, corroborated by the testimony of a disinterested neighbor (Lucy Flores), that Vasquez *did* first attempt to open the trunk before entering the house.

Defendant testified he struck McConnell the one blow to the head with the bar, and that she fell to the ground but was "still breathing." But he failed to explain the autopsy surgeon's conflicting conclusion that the injury resulting therefrom in probability would not have rendered McConnell unconscious, nor how the victim would come to have suffered the many defensive wounds — clearly evidencing her struggle for life as she was being beaten — if his version was true.

Defendant testified that he ran through the rear of the house looking for things to steal, returning within seconds to find Vasquez standing over McConnell holding the bar. He denied ransacking the front master bedroom, testifying it "[m]ust have been [Vasquez]." But as the prosecutor fairly argued, defendant failed to explain how Vasquez could have beaten the victim so extensively and ransacked the master bedroom; all in a matter of "seconds." Defendant also claimed he neither saw nor heard Vasquez beating McConnell because he was not "paying attention," but he failed to explain how he could not have heard the 15 to 20 blows to the victim's head, which Bolanos heard from outside the house, and which, according to the autopsy surgeon, in all probability would have sounded "like a cracked pot" as they landed, cracking the victim's skull.

There were other crucial points of conflict between defendant's extrajudicial statements and trial testimony on the one hand, and the physical evidence and testimony of witnesses on the other. Without belaboring the point, our review of the record indicates that these and other such conflicts were hardly "tangential, collateral and of little importance." "[I]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations]." (*People* v. *Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181].)

8. *Doyle - Massiah Error*

Defendant contends that the prosecutor committed *Doyle* error (*Doyle* v. *Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91, 96 S.Ct. 2240]) when he cross-examined defendant regarding his postarrest silence. He further asserts that those same questions violated his right to counsel. (*Massiah* v. *United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199].) We conclude that under the circumstances the prosecutor's questions had the potential to, but did not, ripen into *Doyle* error. Nor did they

infringe upon defendant's Sixth Amendment rights.

The offending colloquy went as follows:

"[PROSECUTOr]: Q. Mr. Belmontes, from the time you talked to Deputy Holman and Deputy Cooper at the San Joaquin County Jail on March 22nd, 1981, until today in this very courtroom you have never spoken to law enforcement concerning what happened on March 15th, 1981?

"[DEFENDANT]: A. Have I spoken to officers?

"Q. About it. That's right.

"A. From the first day I got arrested until now?

"Q. No. From the jail statement on Sunday, when you were booked in the county jail and gave the third statement we have been calling the jail statement, until now you've never told law enforcement officers about it, anything else that happened there?

"A. No.

"[DEFENSE COUNSEL]: Judge, in fairness, I think the jury should be instructed once he's appointed an attorney, that conversation has to be directed through the attorney.

"[THE COURT]: Yes. The question, ladies and gentlemen, is somewhat misdirected in the sense that Mr. Belmontes does not have to talk to anybody. As a matter of fact, he's admonished by his counsel, once lawyers have been appointed to represent him, not to talk to anybody. You should be aware of that fact. Without the presence of the lawyer.

"[PROSECUTOR]: Q. All right. So from then until now

you haven't been on the record about what happened?

"[DEFENDANT]: A. Not on the record. But a few times Officer Holman has taken me to court while we were in Lodi we talked about it. But not on record.

"Q. About the details of the offense?

"A. Not really details. Just told him that I didn't do it. Told him that I was serious about when I said I hit the girl one time."

The petitioners in *Doyle* were arrested on narcotics charges. They were given *Miranda* warnings (*Miranda* v. *Arizona, supra*, 384 U.S. 436), made no postarrest statements about their involvement in the crime, and for the first time at trial contended they had been framed by a government informant. During cross-examination the prosecutor repeatedly sought to impeach their exculpatory story by asking them why they had failed to assert the "frame-up" defense earlier. The trial court overruled defense counsel's timely objections to this line of inquiry, and permitted the prosecutor to argue petitioners' postarrest silence to the jury. (*Doyle, supra*, 426 U.S. 610 at pp. 613-615, and fn. 5 [49 L.Ed.2d 91 at pp. 95-96].) The high court reversed the convictions, holding that *Miranda* prohibited such questioning and argument as a proper means of impeachment. (*Id.*, at p. 617 [49 L.Ed.2d at p. 97].)

Here, the prosecutor did not ground his case on the theory that defendant had refused to talk to the police. Defendant waived his *Miranda* rights and furnished three statements. He testified that he voluntarily spoke with the officers about the crime en route from Southern California back to Stockton. In short, there were no *facts* supportive of an inference of "postarrest silence" placed before the jury. Indeed the defense itself urged that defendant's trial testimony was essentially consistent with his jailhouse statement made over a year earlier.

The Attorney General argues that the prosecutor's questions were merely designed to point out the inconsistencies between defendant's extrajudicial statements and trial testimony — a permissible avenue of impeachment. (See *People* v. *Barker* (1979) 94 Cal.App.3d 321, 329-330 [156 Cal.Rptr. 407]; *People* v. *Farris* (1977) 66 Cal.App.3d 376, 390 [136 Cal.Rptr. 45]; *People* v. *Love* (1977) 75 Cal.App.3d 928, 934 [142 Cal.Rptr. 532].) Perhaps that is where they were intended to lead. As worded, however, they just as readily could have elicited defendant's testimony that he made no statements about the crime between his third jailhouse statement and trial, and thus technically ran afoul of *Doyle, supra,* 426 U.S. 610.

But upon counsel's objection to the questions, the trial judge immediately admonished the jury that "Mr. Belmontes does not have to talk to anybody" and that "he's admonished by his counsel ... not to talk to anybody." (See *Greer* v. *Miller* (1987) 483 U.S. 756, ___ [97 L.Ed.2d 618, 630-631, 107 S.Ct. 3102] [similar curative admonition].) "Unlike the prosecutor in *Doyle*, the prosecutor in this case was not 'allowed to undertake impeachment on,' or 'permit[ted] ... to call attention to,' [defendant's] silence." (*Id.*, at p. ___ [97 L.Ed.2d at pp. 630-631], quoting *Doyle, supra*, 426 U.S. at p. 619, & fn. 10 [49 L.Ed.2d at p. 98].)

Any error was clearly harmless beyond a reasonable doubt. (*Greer* v. *Miller, supra*, 483 U.S. at p. ___ [97 L.Ed.2d at p. 630]; *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]; cf. *People* v. *Jackson* (1980) 28 Cal.3d 264, 305 [168 Cal.Rptr. 603, 618 P.2d 149].) The prosecutor's questions were brief and unaccompanied by any suggestion that an inference of guilt should be drawn therefrom. Belmontes presented virtually no defense to the overwhelming evidence that a felony murder had occurred, namely, a murder committed in the course of a burglary. (§ 189.) The evidence further supported the jury's findings that he personally, intentionally, and wilfully administered the fatal beating to McConnell. When asked on direct examination: "Did you

contribute to her death?" defendant replied: "Yes." When asked "How?" he acknowledged: "I was involved. I hit her. ..." Although he claimed he struck McConnell only the one blow across her temple, that wound was apparently of insufficient force to lacerate the victim's skin — a circumstance wholly inconsistent with his own admission that he was covered with blood and that he alone had to change his pants at Manuel Vasquez's house after the crime. The nature of McConnell's gaping head wounds; the blood splattered about defendant's face, clothing, and the walls and door jambs next to where she was found; and the many defensive bruises on her arms, hands, legs and feet all evidenced a desperate struggle for life as defendant bludgeoned her with the iron bar.

We likewise reject defendant's related claim under *Massiah* v. *United States, supra*, 377 U.S. 201. There is no showing that the officers in this case at any stage of their investigation transgressed defendant's Sixth Amendment right to counsel. Having concluded that defendant's "postarrest silence" was neither shown by the evidence nor urged before the jury, we decline his further invitation to speculate that the prosecutor's complained-of questions "attribut[ed] a consciousness of guilt to the defendant for following his lawyer's advice ..." and remaining silent.

9. *Uncharged Conspiracy Instructions*

Both defendant and Bolanos revealed in their pretrial statements that they met with Vasquez at the latter's house on the morning of the murder and specifically agreed and conspired to burglarize McConnell's house. Defendant admitted in his statement that overt acts were carried out in furtherance of the planned crime prior to the point at which he knocked on McConnell's door and found her home. He had armed himself with the bar and split up from his cohorts who, according to predesigned plan, were to meet him at the house at a given time and assist in loading the stolen items into the trunk of Bolanos's Chevy.

However, defendant's claim that he personally abandoned any intent to steal when McConnell bid him entry, and his further assertion that shortly thereafter Vasquez had forced entry into the home and commanded him to strike the victim, were also reflected in his statement. Anticipating what would likely be the gist of Belmontes's defense in light of his pretrial statements, the prosecutor elected to proceed on an alternative uncharged conspiracy theory of vicarious liability in addition to the actual malice-premeditation and felony-murder theories of guilt.

Defendant acknowledges that the People proceeded on these three distinct theories of guilt. In his briefs he criticizes but "does not at this point challenge the validity of conspiracy theory in general to establish guilt of a substantive crime. ..."[11] Rather, he asserts error in (1) the failure to instruct that the existence of a conspiracy must be found beyond a reasonable doubt, and (2) the giving of CALJIC No. 6.20 which, he claims, improperly shifted the burden of proving withdrawal from the conspiracy onto him.

a. *Appropriateness of Uncharged Conspiracy Instructions*

Although not raised as a separate challenge to the verdicts of guilt, defendant cites law review commentary to "emphasize the illegitimacy" of permitting the prosecution to proceed on an alternate theory of uncharged conspiracy liability. He asserts such is more appropriately reserved for "combatting complex criminal organizations" or "providing a preemptive social defense against a dangerous design prior to the flash point when it becomes an attempt or completed crime." (See Note, *The*

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11. Contrary to defendant's assertion, our review of the record reveals that the prosecutor announced his intention to proceed on an alternate conspiracy theory in his opening statement, and that defense counsel did not explicitly object to the prosecutor's election to proceed on such theory or to the standard conspiracy instructions requested and given. Counsel did separately submit his own request for aider-abettor liability instructions, which was denied. (See defendant's argument 11, post, at p. 793.)

Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants (1948) 62 Harv. L.Rev. 276, 284-286.)

It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. (*People* v. *Lopez* (1963) 60 Cal.2d 223, 250 [32 Cal.Rptr. 424, 384 P.2d 16] [uncharged conspiracy to commit burglaries admissible to prove identity of murderer]; *People* v. *Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656] [uncharged conspiracy to commit robberies admissible to prove armed robbery culminating in murder].) "Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory (*People* v. *Washington* (1969) 71 Cal.2d 1170, 1174 [81 Cal.Rptr. 5, 459 P.2d 259, 39 A.L.R.3d 541]; *People* v. *Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714])." (*People* v. *Remiro* (1979) 89 Cal.App.3d 809, 842 [153 Cal.Rptr. 89, 2 A.L.R.4th 1135].)

The evidence here showed that defendant, Vasquez and Bolanos met, specifically intended to agree or conspire, specifically intended to commit the planned burglary, and carried out overt acts in furtherance of the conspiracy — completing the intended crime. There being evidence supportive of all the elements of a conspiracy, the People were entitled to proceed on that alternative theory of liability. (*People* v. *Horn* (1974) 12 Cal.3d 290, 296 [115 Cal.Rptr. 516, 524 P.2d 1300].)

b. *Failure to Instruct on Existence of Uncharged Conspiracy Beyond a Reasonable Doubt*

The jury was charged with nine standardized instructions which fully defined all relevant principles underlying the

People's alternative uncharged conspiracy theory of liability.[12] Defendant complains, however, that it was reversible error not to further instruct the jury that the existence of a conspiracy at the time of the killing must be proved *beyond a reasonable doubt* as a prerequisite for vicarious liability.[13]

A similar contention was rejected in *People* v. *Jourdain* (1980) 111 Cal.App.3d 396 [168 Cal.Rptr. 702]. Jourdain, like defendant here, argued he was denied due process of law because the standard conspiracy instructions permitted the jury to connect him to the illegal uncharged conspiracy and thereby convict him upon a standard lower than "beyond a reasonable doubt."

In rejecting claimed error in the refusal to give defendant's proferred "beyond a reasonable doubt" instruction, the *Jourdain* court reasoned: "That argument misses the point. The People had not charged appellant with, nor were they trying to convict him of, conspiracy. ... [¶] The admission of [evidence of conspiracy] was not affected by the fact the information had not charged a conspiracy (*People* v. *Morales* ([1968]) 263 Cal.App.2d 368 [69 Cal.Rptr. 402]), and once there had been proof of the existence of the conspiracy there was no error in instructing the jury on the

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12. These included the definition of an uncharged conspiracy and requisite overt act (CALJIC No. 6.10.5), and instructions explaining the nature of joint conspiratorial responsibility (CALJIC No. 6.11); that proof of express agreement was not required (CAJIC 6.12); that evidence of association alone does not prove membership in the conspiracy (CALJIC No. 6.13); that there is no criminal liability for independent acts of coconspirators not in furtherance of the common criminal design (CALJIC Nos. 6.15 and 6.16); that commission of an act in furtherance of a conspiracy does not itself prove membership in the conspiracy (CALJIC No. 6.18); that only an affirmative and bona fide rejection or repudiation of the conspiracy communicated to the coconspirators will effectuate withdrawal from the conspiracy (CALJIC No. 6.20); and that no shared criminal liability attaches to a conspirator's acts committed after termination of the conspiracy (CALJIC No. 6.21).

13. Although we address the claim on the merits, we note again that defendant failed to proffer a proposed instruction or otherwise object to the standard conspiracy instructions on this ground.

law of conspiracy. (*People* v. *Remiro* (1979) 89 Cal.App.3d 809, 842; *People* v. *Washington* (1969) 71 Cal.2d 1170, 1174.) In so charging the jury the court was not in any way indicating that appellant was being tried for the crime of conspiracy. Rather, the court was merely instructing the jury on the law applicable to the case. (Pen. Code, § 1093.). ... [¶] ... There was only one instruction on the burden of proof given to the jury. That instruction told the jury in terms of Penal Code section 1096 that it could not find appellant guilty until his guilt had been proved beyond a reasonable doubt. (CALJIC No. 2.90.)" (*People* v. *Jourdain, supra*, 111 Cal.App.3d at pp. 403-404.)[14]

As instructed, the jury here was not told it could find defendant guilty on an uncharged conspiracy theory upon less than reasonable doubt. CALJIC No. 2.90 was given. Moreover, the jury's verdicts and special findings reflect that they found defendant's guilt of McConnell's murder beyond a reasonable doubt both on actual malice-premeditation and felony-murder-burglary theories.

c. *Impermissible Shifting of Burden of Proving Withdrawal From the Conspiracy*

We further reject defendant's argument that instructing the jury in accordance with CALJIC No. 6.20 (that only an affirmative and bona fide rejection or repudiation of the conspiracy communicated to the coconspirators will effectuate withdrawal from the conspiracy) impermissibly shifted the burden of proof on such matter to him. As we stated in *People* v. *Crosby* (1962) 58 Cal.2d 713, 731 [25 Cal.Rptr. 847, 375 P.2d 839]: "It is not

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14. Jourdain argued his jury should have been instructed that it must find his *membership in the conspiracy* beyond a reasonable doubt. Here defendant argues the jury should have been instructed it must find *the existence of the conspiracy* beyond a reasonable doubt. For purposes of our analysis these distinctions are not critical. Jourdain's argument was essentially the same as Belmontes's, i.e., that under the standard instructions "the jury could find him guilty of conspiracy upon something less than reasonable doubt." (*Jourdain, supra*, 111 Cal.App.3d at p. 403.)

part of the People's prima facie case to negate the possibility of such a withdrawal. Once the defendant's participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove — as a matter of defense — that he effectively withdrew from the conspiracy ...."

Under CALJIC No. 6.20 the burden is upon the defendant to go forward with evidence of his withdrawal from the conspiracy. His burden is one of production — not persuasion beyond a reasonable doubt of his nonmembership in the conspiracy. Here, defendant made no attempt whatsoever to suggest how he had affirmatively withdrawn from or repudiated his role in the conspiracy to burglarize McConnell's house, much less communicated the same to Vasquez.[15/] Nor under these facts could he readily have done so — *by his own testimony* he felled McConnell with a blow to her head with the iron bar, immediately went about ransacking the rear rooms of her house, ripped out the wires and grabbed a stereo component, then had to urge Vasquez to assist in carrying out the booty as the two fled from the murder scene.

The People properly proceeded on the alternative uncharged conspiracy theory of liability. No prejudice from the giving of the standardized conspiracy instructions is shown.

10. *Special Findings*

The special findings made by the jury in connection with the verdict of guilt of first degree murder were as follows: (1) "We further find that the murder was wilful, deliberate and premeditated"; (2) "We further find that the murder was intentional"; (3) "We further find that the defendant Fernando Belmontes, Jr., personally committed the killing"; and (4) "We further find that the killing occurred as a result of the commission or attempted commission of the crime of burglary."

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15. Defendant has conceded that he "fail[ed] to make an affirmative declaration of withdrawal from the conspiracy agreement."

Two additional special findings were found true in connection with special circumstance: "We further find that the defendant, Fernando Belmontes, Jr., is the actual killer," and "We further find that the defendant, Fernando Belmontes, Jr., in the commission of the special circumstance had the specific intent that death occur."[16]

Defendant argues that these findings were unauthorized "special verdicts" within the meaning of section 1150 and thus violative of his due process rights. (See fn. 17.) We have recently rejected identical arguments and approved the use of "special findings" at the guilt phase such as were made here. (*People* v. *Miranda* (1987) 44 Cal.3d 57, 89-90 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People* v. *Burgener* (1986) 41 Cal.3d 505, 536-538 [224 Cal.Rptr. 112, 714 P.2d 1251]; *People* v. *Davenport* (1986) 41 Cal.3d 247, 273-275 [221 Cal.Rptr. 794, 710 P.2d 861]; *People* v. *Phillips* (1985) 41 Cal.3d 29, 59 [222 Cal.Rptr. 127, 711 P.2d 423].)[17] Moreover, in contrast to Burgener, here the

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16. The only special finding left undated and unsigned by the jury foreman was: "We further find that the defendant, Fernando Belmontes, Jr., intentionally aided, abetted, or assisted in the killing itself and in the commission of murder of the first degree."

The Attorney General argues that its rejection "is most reasonable in light of all the other special findings which negate any findings of guilt under the aider and abettor theory." Defendant counters that such inference cannot be drawn because the jury was instructed on a conspiracy — not aider-abettor — theory of vicarious liability. In light of the other explicit special findings which were found true, we need place no reliance on the jury's failure to make the special finding on aider-abettor liability in reaching our conclusion that defendant was found to be the actual, intentional killer.

17. The utility of such special findings may depend upon which or how many special circumstances are charged. For example, where there is "more than one special circumstance ... charged, but a unanimous finding of guilt on one of them is required before the offense becomes a capital crime, particularized verdicts on each special circumstance are essential." (*People* v. *Davenport, supra*, 41 Cal.3d at pp. 274-275.) We emphasize, however, that section 190.4, subdivision (a), does not *require* "special findings" beyond "what the statutory language calls for: a finding of the truth or lack of *truth* of each circumstance, not the facts upon which the finding is based." (*Id.*, at p. 275; cf. *People* v. *Ghent, supra*, 43 Cal.3d at pp. 762-763 [1977

jury was explicitly instructed in connection with the special findings that they could only be found true unanimously and beyond a reasonable doubt.

Nor is there any merit to defendant's claim that the special finding of premeditation and deliberation is factually unsupported. Defendant's admitted acts of arming himself with the iron bar, following McConnell to the front door when Bolanos and Vasquez were heard driving up, and striking her in the head with the bar with as much force as he could muster in a "back-handed sweeping motion," alone support the jury's finding of premeditation and deliberation beyond a reasonable doubt. (See *People* v. *Anderson* (1968) 70 Cal.2d 15 [73 Cal.Rptr. 550, 447 P.2d 942].)

Lastly, we reject out of hand defendant's further arguments that the special findings were "unreliable, ambiguous, and meaningless surplusage," and that defense counsel had no "notice of" their "potential legal significance" or "opportunity to contest their factual basis." The charges and special circumstance alleged in the information, as well as the record of proceedings on pretrial motions and the prosecutor's opening statement, all belie these assertions. Defendant's own extrajudicial admissions that he armed himself before entering McConnell's residence, personally felled her with a blow from the iron bar, and completed the burglary and fencing of the stereo, surely put counsel on notice of the independent viability of the People's premeditated-murder *and* felony-murder theories of guilt.

11. *Refusal to Instruct on Lesser-related Offenses and Aider-abettor Liability*

In reliance on our opinion in *People* v. *Geiger* (1984) 35 Cal.3d 510 [199 Cal.Rptr. 45, 674 P.2d 1303, 50 A.L.R.4th 1055], defendant contends it was error to refuse his requested instructions on the *lesser-related* offenses of assault with a

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death penalty law].)

deadly weapon, battery, and simple theft. Recognizing that we expressly declared the rule in Geiger to be prospective only (*id.*, at p. 532, fn. 13), he nevertheless urges "that a narrow exception of retroactivity should be carved for capital appellants." We decline the invitation. We explained in *Geiger* that "the purpose of instructing on related offenses is primarily prophylactic ...." (*Ibid.*) Moreover, these facts do not support the possibility that the jury would have convicted defendant of the lesser-related offenses under the refused instructions.

We further reject defendant's claim that it was prejudicial error to refuse his requested instructions on aider-abettor liability. (CALJIC Nos. 3.00-3.02.) The court refused to so instruct the jury because the People had elected to proceed on an uncharged conspiracy theory of vicarious liability. Belmontes's hollow defense would have fared no better under aider-abettor instructions. Under conspiracy law the People had a higher burden of proof; having to establish specific intent to conspire and commit the burglary, as well as completion of overt acts in furtherance thereof. Moreover, in order to withdraw from the planned burglary as an aider-abettor, defendant would have had to have notified his accomplices *and further* done everything in his power to prevent commission of the crime. (CALJIC No. 3.02.) In contrast, to withdraw from a conspiracy, one need only make an affirmative repudiation communicated to his coconspirators. (CALJIC No. 6.20.) Defendant proferred no facts suggestive of his "withdrawal" under either theory. In any case, given the evidence and special findings made by the jury, any error in refusing the requested aider-abettor instructions was necessarily harmless.

C. SPECIAL CIRCUMSTANCE ISSUES

1. *Carlos Error*

Defendant urges that we strike the special circumstance under authority of *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], wherein we held that intent to kill

is an element of the felony-murder special circumstance of the 1978 death penalty law, whether applied to accomplices or to actual killers. (*Id.*, at pp. 153-154.) His contention must be rejected.

The United States Supreme Court has made clear that felony murderers who personally killed may properly be subject to the death penalty in conformance with the Eighth Amendment — after proper consideration of aggravating and mitigating circumstances — even where no intent to kill is shown. (*Cabana* v. *Bullock* (1986) 474 U.S. 376, 386-387 [88 L.Ed.2d 704, 716-717, 106 S.Ct. 689, 697]; see *Tison* v. *Arizona* (1987) 481 U.S. 137, 152 [95 L.Ed.2d 127, 141, 107 S.Ct. 1676, 1685].) Subsequently, "[i]n *People* v. *Anderson* [(1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]], we held that with respect to the actual killer, the court need not instruct on intent to kill in connection with felony-murder special circumstances. Such an instruction is required only when there is evidence from which the jury could find that the defendant was an accomplice rather than the actual killer." (*People* v. *Gates* (1987) 43 Cal.3d 1168, 1193 [240 Cal.Rptr. 666, 743 P.2d 301].)

Here the jury made express findings that defendant *personally* committed an intentional, wilful, deliberate, premeditated murder; that the killing was the result of the commission or attempted commission of the burglary; and that defendant was the *actual killer* and had harbored specific intent to kill. We have rejected the several grounds upon which defendant urges that these special findings were procedurally defective. (*Ante*, at pp. 793-794.) The evidence supports the jury's findings beyond a reasonable doubt that defendant *personally* and *intentionally* killed McConnell — and its rejection of his claim that Vasquez was in the house at the time and "must have" killed her while he (defendant) was busy ransacking the house.[18/]

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18. In any event, in anticipation of our former Carlos holding, the trial court modified CALJIC No. 8.80, instructing the jury that: "If the defendant was not the actual killer, it must be proved beyond a reasonable

2. *Construing the Felony-murder Special Circumstance as Limited to Premeditated and Deliberate Murders*

Defendant urges us to construe the felony-murder special circumstance (§ 190.2, subd. (a)(17)) as limited to *premeditated* and *deliberate* intentional murders. Such was the requirement under the former 1977 death penalty legislation. (*Carlos, supra*, 35 Cal.3d at pp. 138-143.) In *Carlos* we recognized that "[t]he 1978 initiative repealed provisions of the 1977 act requiring physical presence and a wilful, deliberate, and premeditated killing before the jury could find a felony-murder special circumstance." (*Id.*, at p. 143.) The United States Supreme Court has since made it clear that the Eighth Amendment too does not compel such limitations upon death-qualifying felony murders. (*Cabana* v. *Bullock, supra*, 474 U.S. at pp. 386-387 [88 L.Ed.2d at pp. 716-717, 106 S.Ct. at p. 697]; see *Tison* v. *Arizona, supra*, 481 U.S. at p. 152 [95 L.Ed.2d at p. 141, 107 S.Ct. at p. 1685].)

3. *Corroboration of Accomplice Testimony to Prove Special Circumstance*

Defendant renews his assertion that the only evidence of his intent to kill came from the uncorroborated accomplice testimony of Bolanos. He argues such as a separate ground for reversal of the special circumstance finding.

Section 190.4, subdivision (a), provides in relevant part that: "Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime." We have already

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doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the killing itself and in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to Mr. Belmontes." Thus, even had the proposed special findings not been made by the jury — under the modified instruction — defendant was clearly found to have acted with specific intent to kill.

rejected defendant's claims that Bolanos's testimony was the sole source of evidence of defendant's intent to kill, and that Bolanos's testimony in this regard went uncorroborated. (*Ante*, at p. 782.) By parity of reasoning we find the instant claim to be without merit. (Cf. *People* v. *McDonald* (1984) 37 Cal.3d 351, 378 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011] [construing § 190.4 in the context of double jeopardy principles];

People v. *Mattson* (1984) 37 Cal.3d 85, 93-94 [207 Cal.Rptr. 278, 688 P.2d 887] [construing § 190.4 in the context of the corpus delicti requirement].)

II. PENALTY PHASE

A. FACTS

Evidence in Aggravation

At the penalty phase the prosecutor introduced evidence of (1) defendant's acquisition of a handgun in early 1979; (2) defendant's carrying the gun for protection during the same time period; (3) his April 1979 conviction as an accessory to voluntary manslaughter; (4) a domestic aggravated assault and battery during the month preceding McConnell's murder; (5) an altercation occurring while defendant was a ward in a county youth facility; and (6) autopsy photographs depicting the nature and extent of McConnell's fatal injuries.

Acquisition of the Handgun

In early 1979, William Cartwright managed a motel in Ontario, California, and was casually acquainted with defendant. He testified regarding an occasion when one "Rudy" met defendant at the motel and attempted to sell him a .32 caliber automatic handgun which he had acquired in a burglary. Rudy handed the loaded weapon to defendant and asked if he wanted to buy it. Defendant cocked the trigger, pointed it at Rudy and replied: "I've got it now. Why buy it?" Rudy left the premises

and defendant retained the weapon.

Evidence of Defendant's Carrying the Gun for Protection

Steven Cartwright testified he was acquainted with defendant in February 1979. He recalled a discussion with defendant who alluded to the fact that some people were "upset" with him. As defendant said this he indicated he had a gun in his belt, slapped his side, and stated he was not concerned as he had all the protection he needed.

Prior Conviction as an Accessory to Voluntary Manslaughter

The prosecution and defense stipulated that on April 16, 1979, in San Bernardino County Municipal Court, defendant entered a plea of no contest to a charge of being an accessory after the fact to voluntary manslaughter (§§ 32, 192, subd. (1)), a felony, and was thereafter sentenced after preparation of a probation report.

Altercation in Youth Facility

In May 1979, defendant was a ward under the supervision of group counselor Ron Cutler. Cutler testified regarding an incident when defendant was observed swinging a chair and about to hit another ward. Cutler was able to knock the chair out of defendant's hands in mid-air before he could strike the other youth with it.

Domestic Aggravated Assault and Battery

In February 1981, defendant, Barbara Murillo (then four months pregnant with defendant's second child), and their two-year-old daughter were living in an apartment in Lodi rented for them by Murillo's parents. Murillo testified for the People regarding an incident that occurred when Bolanos, Cobarrubio, and others were visiting at the apartment. Murillo and defendant got into an argument which escalated into an altercation. Murillo

grabbed a "file" for protection and attempted to phone the police. Defendant cut the telephone cord with his knife. Murillo tried to get out of the apartment. Defendant pushed her and hit her on the head; at one point causing her to drop their infant daughter. He shoved Murillo to the ground and choked her; others present managed to temporarily thwart the attack. Murillo broke out a window and tried to escape through it. Defendant, with the assistance of another male, caught up with and dragged or carried her back into the apartment. A neighbor finally summoned the police who arrived as defendant was leaving the premises.

Evidence in Mitigation

Defendant was one month shy of age 20 at the time of McConnell's murder. His mother testified that her marriage to his father was an unhappy one. He was an alcoholic prone to violence and would beat her; breaking her arm on one occasion, stabbing her in another incident. Defendant was 10 years old when the marriage broke up. Mrs. Belmontes remarried; she testified defendant's stepfather was strict and defendant became difficult to control when the second marriage ended after five years. Defendant had not lived with his mother since being committed to the California Youth Authority in 1979. At the time of trial defendant had a younger brother and sister. Ms. Belmontes characterized defendant's relationship with his sister as "very close."

Defendant's grandfather testified that he and his wife were close to defendant, who attended his grandmother's funeral in 1978. He confirmed that defendant's natural father drank to excess and beat his daughter (defendant's mother). The grandfather had no contact with defendant after his release from the Youth Authority.

Robert Martinez, age 24, testified on defendant's behalf. They were close friends during their early teens and usually spent their time working on Martinez's "low rider" automobile, smoking marijuana and drinking beer, and "hanging around" a car club.

Defendant was "best man" at Martinez's wedding. Martinez felt defendant was not a violent person. He and his wife had no contact with defendant after his one visit with them shortly after his release from the Youth Authority.

Martinez's wife Darlene testified she considered defendant a close friend. She was a born-again Christian; when defendant visited with them after his release from the Youth Authority he had advised her that he too was a born-again Christian. He also mentioned his struggling relationship with Murillo and expressed concern that she was not a Christian.

Reverend Dale Barrett, chaplain at the California Youth Authority's Pine Grove Facility, knew defendant from his participation in the "M-2" program, under which a member-family of a local church would be matched with a ward, who in turn would be permitted to visit with the family at specified times. Defendant was matched with Beverly and Fred Haro and participated in the program for about a year. Defendant was baptized during his stay in the Youth Authority. Reverend Barrett felt that unlike the many wards who stayed in the program only to get out of camp and manipulate favors from the sponsoring families, defendant had not "conned" them. He testified that although he personally believed in the death penalty as a deterrent to premeditated murders, he did not feel defendant deserved to die because he was a salvageable person with extenuating circumstances in his life. Although his knowledge of defendant's crimes was concededly limited, it was his understanding that they had not been conclusively determined as premeditated.

The Haros testified they were members of Reverend Barrett's church. Through participation in the "M-2" program defendant had spent Wednesday evenings and weekends with them over a period of time. The Haros also sponsored other wards whom they treated as their own sons. They felt they had a good relationship with defendant, who on occasion had attended church with them. They felt defendant had been a good influence on their own

teenage son. Fred Haro testified he was "strongly for the death penalty" but believed defendant was innocent of the charges and thus did not deserve to die. Beverly Haro felt Barbara Murillo was the primary negative factor in defendant's life.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and director of the "M-2" program, helped place defendant in a halfway house in Oakland upon his release from the Youth Authority. He was aware that defendant stayed in that facility only two weeks before moving to the Lodi area to take a job with the forest service. Defendant returned to Preston on a few occasions after his release and spoke to wards about what life was like "on the outside." Reverend Miller believed defendant would be good at talking with other prisoners if he were committed to prison for a life term.

Defendant testified in his own behalf. He had a poor relationship with his father who would come home drunk and hit his mother. He did not like school and stopped attending in the ninth grade. Although his youth was "pretty hard," defendant twice stressed he did not want to "use it as a crutch."

Defendant was in the custody of the Youth Authority from early 1979 through his release in November 1980. He worked on the fire crew at the Pine Grove Camp for one year. He admitted he initially entered the "M-2" program as a way to get out of camp. Thereafter, he studied the Bible with the Haros and in time started serving the Lord. He was paroled from the Youth Authority after serving his maximum sentence. He stayed at the halfway house in Oakland for two weeks and then went to Southern California for a short period, returning with Murillo to the Lodi area to take a job with the forest service. Things did not go well for defendant while he was living with Murillo. He "couldn't deal with" his religious commitment and "started going back to [his] old ways," in part due to "pressure on the streets." At the time of trial, defendant had not abandoned his religious beliefs but felt he was no longer "dedicated one hundred percent" to his religious commitment.

At the conclusion of the evidentiary stage, the court permitted defendant to personally address the jury in his own behalf during closing arguments.

B. PENALTY PHASE ISSUES

1. *Use of Peremptory Challenges to Exclude Prospective Jurors Expressing Reservations About the Death Penalty*

Defendant contends that the prosecutor improperly exercised peremptory challenges to excuse four prospective jurors who — although not excusable for cause under *Witherspoon* v. *Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] — nevertheless expressed some reservations about the death penalty. We have rejected the argument in *People* v. *Turner* (1984) 37 Cal.3d 302 [208 Cal.Rptr. 196, 690 P.2d 669], wherein we found "no ... constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty." (*Id.*, at p. 315.)

2. *Instructions on Sympathy and General Character and Background Evidence*

(31) Defendant argues that the jury was misinstructed on the proper role of sympathy and general character and background evidence in the penalty phase.

In *People* v. *Melton* (1988) 44 Cal.3d 713, 759 [244 Cal.Rptr. 867, 750 P.2d 741], we explained: "We previously reversed several death judgments where (1) a 'no-sympathy' instruction was given *at the penalty phase*, (2) the jury also received, without elaboration, an instruction (the 'unadorned factor (k) instruction') to consider mitigating evidence which 'extenuates the *gravity of the [capital] crime*' (§ 190.3, subd. (k); former § 190.3, subd. (j); CALJIC, former No. 8.84.1, subd. (k), italics added), and (3) defendant introduced substantial evidence about his *general character and background*. In such cases, we

reasoned, there was intolerable ambiguity about whether the jury understood its power and duty under the Eighth Amendment to consider all 'sympathetic' evidence defendant proffered on behalf of a penalty less than death. (E.g., *People* v. *Brown* (1985) 40 Cal.3d 512, 537-538 [220 Cal.Rptr. 637, 709 P.2d 440]; *People* v. *Lanphear* (1984) 36 Cal.3d 163, 166-169 [203 Cal.Rptr. 122, 680 P.2d 1081]; *People* v. *Easley* (1983) 34 Cal.3d 858, 878-879 [196 Cal.Rptr. 309, 671 P.2d 813]; see *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 117 [71 L.Ed.2d 1, 12, 102 S.Ct. 869], and conc. opn. of O'Connor, J., at p. 119.)[19/]

"The United States Supreme Court granted certiorari in *People* v. *Brown, supra*, 40 Cal.3d 512, to consider the constitutional effect of a 'no-sympathy' admonition on penalty deliberations in a capital case. The court has concluded that a warning to ignore 'mere' sympathy does not offend the Eighth Amendment in and of itself. However, where the jury was cautioned against sympathy and also received an unadorned factor (k) instruction, the penalty-phase instructions and arguments must be examined as a whole to determine whether the jury was 'adequately informed ... of its responsibility to consider all of the mitigating evidence introduced by the [defendant] ....' (*California* v. *Brown* (1987) 479 U.S. 538, 546 [93 L.Ed.2d 934, 943, 107 S.Ct. 837] [conc. opn. of O'Connor, J.].)"

We conclude the jury here was adequately informed of the full nature of its responsibility to consider sympathy and general character and background evidence.

First, the standardized "no-sympathy" instruction was not

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19. In a footnote we explained: "CALJIC No. 8.84.1 has since been revised to make clear, as we directed in Easley, that mitigating evidence to be considered under 'factor (k)' includes 'any ... "aspect of [the] defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." ...' (P. 878, fn. 10; see CALJIC No. 8.84.1, subd. (k) (4th ed. 1984 rev.).)"

given in this case. At the People's request, a modified version of CALJIC No. 1.00 was given. The words "sympathy" and "passion" were omitted from the first sentence of the instruction, which as modified read: "You are instructed that as jurors you must not be swayed by mere sentiment, conjecture, [] ... prejudice, public opinion, or public feeling." (Contrast CALJIC No. 1.00.) The following charge was then read after the first modified sentence: "Also, you must not be influenced by sympathy or passion except as those feelings properly arise out of your consideration of the proven factors in aggravation and mitigation." Thus the trial judge and prosecutor here presciently fashioned an instruction which satisfies the directives announced by the United States Supreme Court nearly five years later in *California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].[20/]

Next, although the jury did receive an instruction in the literal terms of factor (k), it was also instructed that only *statutory* aggravating factors could be properly considered (§ 190.3), immediately followed by a special instruction which stated: "the mitigating circumstances which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them, standing alone, may support a decision that death is not the appropriate punishment in this case [italics added]."

The prosecutor's argument reinforces our conclusion that, as

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20. Defendant contends that the modified instruction was itself incorrect and misleading because sympathy for the defendant cannot "properly arise" out of an aggravating factor. In so arguing, however, he interprets the proper role of "sympathy" at the penalty phase too narrowly. The United States Supreme Court has implicitly recognized that a penalty phase juror need not "ignore emotional responses" which are "rooted in the aggravating and militating evidence introduced during the penalty phase." (*California* v. *Brown* (1987) 479 U.S. 538, 542 [93 L.Ed.2d 934, 940, 107 S.Ct. 837].)

instructed, the jury must have fully understood its obligation to weigh all of defendant's mitigating evidence. He told the jurors: "With respect to the instructions ... in this listing of aggravating and mitigating circumstances which you are to weigh one against the other, there is a proper place for sympathy and passion. [¶] ... At this stage of the proceedings you are not only the judges of the facts, you decide how much they weigh. And in weighing them, it is proper to take into account factors that impinge upon anger and sympathy and so forth." He went on to explain: "Let me tell you what that doesn't mean, if I may. Your regard for Steacy McConnell's family, mean no one [sic], no one can deny sympathy for them, no one. But that is not the kind of sympathy the instruction tells you to consider. It says as sympathy or passion naturally arises or properly arises from the factors in aggravation and mitigation. ... [¶] ... it is different from the guilt phase when sympathy was to play no part at all."

In discussing the scope of "factor (k)" evidence in his argument, the prosecutor did at first express some doubt as to whether evidence of defendant's prior religious experience "really fits in there." However, he quickly concluded: "I think it appears to be a proper subject of consideration." He then argued his position that defendant's religious experience *prior to the murder* was not a strong mitigating factor under all the circumstances. He suggested the jury should "weigh" defendant's "religious awakening" as "a basis for determining penalty," particularly in the context of Reverend Miller's opinion that, if given a life term, defendant would be good at talking and working with other prisoners. The prosecutor concluded in this vein: "I think that value to the community is something that you have to weigh in. There's something to that."

Finally, in summing up all the penalty phase evidence, the prosecutor candidly stated: "The prior criminal activity has been described to you on the stand isn't great, you know. [¶] All right. So these things, they really, they don't show that the defendant is such a horrible person that the ultimate penalty must be imposed." The prosecutor went so far as to suggest that the

aggravating factors — other than those circumstances directly related to the murder — came to a "draw." The thrust of his penalty phase argument was that the aggravated circumstances of the crime itself were the major factors outweighing the mitigating evidence and militating in favor of the death penalty.

Viewing the instructions and arguments as a whole, we conclude there exists "no legitimate basis" for believing the jury was misled regarding its sentencing responsibilities. (*California* v. *Brown, supra*, 479 U.S. at p. 546 [93 L.Ed.2d at p. 943, 107 S.Ct. at p. 842] [conc. opn. of O'Connor, J.].)

3. *"Mandatory" Nature of 1978 Death Penalty Law*

Defendant attacks the instruction which charged the jury that it "shall" impose death if it finds that aggravating "outweigh" mitigating circumstances. (CALJIC, former No. 8.84.2; see § 190.3.)

We recently summarized the relevant principles in *People* v. *Gates, supra*, 43 Cal.3d at pages 1203-1204 as follows: "In *People* v. *Brown* (1985) 40 Cal.3d 512, 538-545 (revd. on other grounds *California* v. *Brown* (1987) U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]), we concluded that the directive of section 190.3 that the trier of fact 'shall impose a sentence of death' if it 'concluded that the aggravating circumstances outweigh the mitigating circumstances,' did not impermissibly restrict the jury's constitutional sentencing discretion. We rejected the defendant's proffered mechanistic construction of the words 'outweigh' and 'shall' in favor of one which directed the jury to weigh the various factors and determine under the relevant evidence which penalty is appropriate in a particular case. We noted, however, that the statutory language — particularly the words 'shall impose' — left room for some confusion about the jury's role and therefore directed courts in the future to instruct on the scope of the jury's discretion. We further stated that each prior case 'must be examined on its own merits to determine whether, in context, the sentencer may have been misled to

defendant's prejudice about the scope of its sentencing discretion under the 1978 law.' (*Id.*, at p. 544, fn. 17.)

"Our concerns in *Brown* were essentially two: The first was that the jury might be confused about the nature of the weighing process, that it is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. Our second concern was that use of the word 'shall' might mislead the jury as to the substance of the ultimate determination it was called upon to make. In *Brown*, we concluded that the statutory language 'should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.' (40 Cal.3d at p. 541.)" (See also *People* v. *Allen* (1986) 42 Cal.3d 1222, 1276-1277 [232 Cal.Rptr. 849, 729 P.2d 115].)

We have examined the instructions and arguments in this regard and determine that, overall, the jury was adequately informed of the full nature of its sentencing responsibility. (*People* v. *Brown, supra*, 40 Cal.3d at p. 544, fn. 17.) While it heard the "shall/outweigh" instruction, the jury also received additional instructions further defining its proper sentencing function. It was told that aggravating factors were strictly limited by statute and must be proved beyond a reasonable doubt. As already noted, it was further told that the mitigating factors enumerated in the statute were merely "examples" of mitigating circumstances which could be considered, and that any one mitigating circumstance *standing alone* could support a decision that death is not the appropriate penalty in this case.

Regarding counsel's arguments, here, as in *Allen*, "the prosecutor not once suggested the weighing process was a mechanical function. Indeed, he effectively told the jury just the opposite, and attempted to give guidelines that could be applied

by each individual juror to first value and then weigh the respective factors." (*People* v. *Allen, supra*, 42 Cal.3d at p. 1277.) He told the jury they must "weigh" aggravating against mitigating circumstances in determining penalty, and explained: "[Y]ou decide how much they weigh." He used the terms "weigh," "simple weighing," and "balance" several times in his discussions of each of the individual aggravating and mitigating circumstances. He urged the jury to assess defendant's prior religious experience and attempt to determine "how much does that weigh." He stated that defendant's potential value to the community or prison population should he be sentenced to life imprisonment was "something you have to weigh in." He stressed to the jurors that defendant's obvious intelligence was "a factor to be weighed," as was any lingering doubt about his guilt of McConnell's murder.

As already noted, the prosecutor suggested that the aggravating circumstances — exclusive of those directly related to the brutal murder — did not in and of themselves warrant the death penalty. Our review of the instructions and arguments as a whole compels rejection of defendant's assertion that the giving of the "shall/weigh" instruction "misled the jury into abandoning its role as conscience of the community and assuming a role more akin to that of a penological account," "governed by the type of 'arithmetical formula' condemned in [*Brown, supra*, 40 Cal.3d 512]."

Lastly, defendant refers us specifically to one juror's (Juror Hearn's) inquiry about "the listing" of aggravating and mitigating circumstances. She asked, "That was the listing, right?" and then inquired: "Of those certain factors we were to decide one or the other and then balance the sheet?" The court responded: "That is right. It is a balancing process."

At oral argument, appellate counsel asserted that these inquiries reflect that "Mrs. Hearn was seeking judicial confirmation of her restrictive view of the scope of factors which should go into the penalty phase deliberations." We cannot agree

with counsel's conclusion that the juror's mere reference to the statutory "listing" of aggravating and mitigating factors — as a predicate to her question about the balancing process — reflected her "restrictive" view of factor (k) evidence. Nor can we agree that "the court compounded the error in its response, 'That was the listing, yes.'" Counsel suggests that the "constitutionally correct" answer would have been: "That list is exhausting [*sic*] as to aggravating factors, but it is only illustrative as to mitigating factors." That is precisely what the court's modified instructions on mitigating evidence conveyed. (*Ante*, at pp. 800-801.)

Defendant also infers from Juror Hearn's use of the term "balance the sheet" in her inquiry that she was following the type of "arithmetical formula" which this court condemned in *Brown, supra*, 40 Cal.3d 512. But viewed in the overall context of the instructions and arguments, neither the juror's question nor the court's response supports an inference of reversible *Brown* error. Defendant misreads our statement in *Brown* — to the effect that in weighing mitigating against aggravating circumstances "the balance is not between good and bad but between life and death" (*id.* at p. 542, fn. 13) — as a blanket condemnation of use of the term "balancing" to describe the "weighing" process. Elsewhere in *Brown* we characterized the term "weighing" as "connot[ing] a mental balancing process. ..." (*Id.*, at p. 541.) There is nothing inherently misleading in use of the term "balancing" to describe the weighing process — where the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities.[21/]

4. *Requiring Appropriateness of Death Penalty to Be Shown Beyond a Reasonable Doubt*

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21. The verb "balance" is defined thusly: "1. To weigh in a balance; to estimate the weight of; to ponder; 2. To weigh (two things) by each other; to compare in relative force, importance, value, etc. ..." (Webster's New Internat. Dict. (2d ed. 1936) at p. 206.)

Defendant asserts that the 1978 death penalty law is unconstitutional in that it fails to require the jury to find *beyond a reasonable doubt* (1) that the aggravating factors outweigh those in mitigation, and (2) that death is the appropriate penalty. We have recently rejected these identical arguments. (*People* v. *Melton, supra*, 44 Cal.3d at pp. 762-763; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Allen, supra*, 42 Cal.3d at p. 1285.)

5. *Specific Findings on Aggravating and Mitigating Circumstances at the Penalty Phase*

Defendant argues that the court erred in denying defense counsel's request that the jury be required to make specific findings regarding any aggravating or mitigating factors found to be true. We have recently rejected this argument; written findings disclosing the precise reasons for the jury's penalty verdict are not required. (*People* v. *Rodriguez, supra*, 42 Cal.3d at pp. 777-779; *People* v. *Allen, supra*, 42 Cal.3d at p. 1285; cf. *People v. Frierson* (1979) 25 Cal.3d 142, 178-180 [158 Cal.Rptr. 281, 599 P.2d 587] [1977 death penalty law]; *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871].)

6. *Age as an Aggravating Factor*

One of the factors to be considered by the penalty phase jury "if relevant" is "[t]he age of the defendant at the time of the crime." (§ 190.3, factor (i).) The prosecutor here told the jury it was for them to determine whether defendant's age was a factor in aggravation or mitigation. He went on to argue: "The defendant may well say I was only 19 when this happened or the attorney may say he was only 19 and when you're young you sometimes you make mistakes, mistakes that you would never make if you were 29 or 39. And that sort of thing must be taken into account. When you are young, your judgment isn't right or isn't mature or developed. [¶] On the other hand, however, it's

common experience that when you're young people are idealistic, altruistic, they believe that anything is possible, that people love one another or that everything is good or all is good for them and that as they age, a cynicism creeps in. Maybe that's too strong a word. A hardening, maybe. And that it doesn't always necessarily mean that you're a better person when you get older. [¶] Going the other way around, it doesn't mean you're a better person when

you're younger, either. [¶] All I'm saying is that I think the age of the defendant goes both ways, really." In further commenting on defendant's own testimony that he was not relying on his difficult childhood to justify his criminal acts, the prosecutor stated: "But he's old enough that he has to take responsibility for his own actions, and he told you that. He can't use that as a crutch. I give him credit for recognizing that."

Defendant asserts that this was improper argument on age as an aggravating factor. Initially, we note that defendant failed to object to the prosecutor's comments or to request an appropriate admonition. Accordingly, to the extent he is arguing "misconduct," he has waived the objection on this ground on appeal. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 788; *People* v. *Allen, supra*, 42 Cal.3d at pp. 1283-1284; *People* v. *Green, supra*, 27 Cal.3d at p. 27.)

We recently stated that "mere chronological age, a factor over which one can exercise no control, should not of itself be deemed an aggravating factor." (*People* v. *Rodriguez, supra*, 42 Cal.3d p. 789.) On the other hand, "mere chronological age of itself should not be deemed a mitigating factor. Age alone is plainly 'a factor over which one can exercise no control.' (*Rodriguez, supra*, at p. 789) .... [¶] In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (*People* v. *Lucky* (1988) 45 Cal.3d 259, 302.)

Here the prosecutor in essence argued that defendant's age was a "neutral" factor: "All I'm saying is that I think the age of the defendant goes both ways, really." He did not declare affirmatively that defendant's "mere chronological age" of almost 20 years weighed in favor of the death penalty. (*Rodriguez, supra*, 42 Cal.3d at p. 789.) He remarked that defendant was "old enough that he has to take responsibility for his own actions." Such comment "reasonably may be viewed as merely arguing the inapplicability of a mitigating factor, rather than seeking to penalize defendant by reason of his age." (*People* v. *Ghent, supra*, 43 Cal.3d at p. 775.)

7. *Lack of Remorse as an Aggravating Factor*

Defendant contends that the prosecutor impermissibly argued lack of remorse as an aggravating factor. The prosecutor told the jury: "[Defendant] can't suggest to you he feels remorse, because ladies and gentlemen of the jury, that is the one thing that we have never heard, that he is sorry. As a matter of fact, the only emotion, the only genuine emotion that I saw, and I think you saw, came during his cross-examination on the guilt phase when he expressed anger at Domingo Vasquez for standing and staring in shock instead of picking up the stereo. So there is no remorse. No thought of Steacy."

It is clear that the People may not present evidence in aggravation unless it is relevant to an aggravating circumstance expressly listed in section 190.3 (*People* v. *Boyd* (1985) 38 Cal.3d 762, 771-776 [215 Cal.Rptr. 1, 700 P.2d 782].)

Defendant failed to object to the prosecutor's comments on remorse. Nor did he request a curative admonition. To the extent he is claiming it was "misconduct" to affirmatively argue lack of remorse as an aggravating factor, he has waived the objection on appeal. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 788; *People* v. *Allen, supra*, 42 Cal.3d at pp. 1283-1284; *People* v. *Green, supra*, 27 Cal.3d at p. 27.)

"[W]e have held that, under a prior death penalty law, the presence or absence of remorse is a factor relevant to the jury's penalty decision. (*People* v. *Coleman* [(1969)] 71 Cal.2d [1159'], at p. 1168 [80 Cal.Rptr. 920, 459 P.2d 248].) The concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal." (*People* v. *Ghent, supra*, 43 Cal.3d at p. 771.)

Although in *Davenport* we held that "in the future" prosecutors should refrain from arguing the mere absence of a mitigating factor as itself constituting an aggravating circumstance (41 Cal.3d at p. 289), here the prosecutor's reference to defendant's lack of remorse, "as in his comments on age ... did no more than suggest the *inapplicability* of a *mitigating* factor." (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 790; *People* v. *Ghent, supra*, 43 Cal.3d at p. 771.) It was part-and-parcel of his overall argument that each category of defendant's penalty phase evidence (e.g., defendant's "religious beliefs" within the "catchall provision" of factor (k)) was worthy of assignment of only marginal mitigating "weight."

Lastly, even were we to read the prosecutor's closing argument as affirmatively advancing defendant's lack of remorse as an aggravating circumstance, our review of the record convinces us that such remarks could not have affected the jury's penalty verdict. (*People* v. *Ghent, supra* 43 Cal.3d at pp. 775-776.)

8. *Evidence of Other Criminal Conduct*

Defendant argues that the admission of prior *unadjudicated* criminal conduct at the penalty phase violated his state and federal due process rights. The claim lacks merit. Section 190.3 constitutionally permits introduction at the penalty phase of evidence of prior unadjudicated criminal conduct as relevant to and bearing upon the character and record of the individual offender. "As the plurality opinion in *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 304 [49 L.Ed.2d 944, 961, 96 S.Ct. 2978], emphasized: '... [I]n capital cases the fundamental

respect for humanity underlying the Eighth Amendment [citation] *requires consideration of the character and record of the individual offender* and the circumstances of the particular offense *as a constitutionally indispensable part of the process of inflicting the penalty of death*.' (Italics added.)" (*People* v. *Robertson* (1982) 33 Cal.3d 21, 58 [188 Cal.Rptr. 77, 655 P.2d 279], first italics added; see *Eddings* v. *Oklahoma, supra*, 455 U.S. 104, 111-112 [71 L.Ed.2d 1, 8-9]; *Lockett* v. *Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954] (plur. opn.); *People* v. *Brown, supra*, 40 Cal.3d at p. 539.)

Defendant further contends that none of his prior instances of unadjudicated criminal conduct constituted a cognizable criminal offense involving force or violence.

Insofar as section 190.3 contemplates consideration of defendant's criminal history (see factors (b), (c)), such evidence "must be limited to ... conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. ..." (*People* v. *Phillips*, (1985) 41 Cal.3d 29, 72; see also *Boyd, supra*, 38 Cal.3d at pp. 776-778.) We have also made clear the distinction between "criminal activity" and "convictions" for purposes of section 190.3. "The plain meaning of [factors] (b) and (c) of section 190.3 is that the jury must consider any *violent* criminal activity by the defendant, *whether or not it led to prosecution and conviction* [fn. omitted], and any 'prior *felony conviction*' (italics added), whether the underlying offense was violent or nonviolent. (See ... *Boyd* (1985) 38 Cal.3d 762, 774, 776.) ...." (*People* v. *Balderas* (1985) 41 Cal.3d 144, 201 [222 Cal.Rptr. 184, 711 P.2d 480], second italics added.)

The prosecutor was entitled to present testimonial evidence of violent "criminal activity" with which defendant had never been charged. (*Balderas, supra*, 41 Cal.3d at pp. 201, 205; see also *People* v. *Robertson*, *supra*, 33 Cal.3d at p. 53.) Defendant's domestic altercation with Murillo; his pointing a loaded gun at "Rudy" in order to appropriate the weapon; and his apparently unprovoked act of swinging a chair at another ward at a youth

facility, were all violent criminal offenses (aggravated assault, battery, assault with a deadly weapon, and simple assault) and thus properly argued as aggravating circumstances.

It was error, however, to admit evidence that defendant, while in the presence of an acquaintance, once slapped his side indicating he had a handgun in his waistband, while stating he had "all the protection he needed." Although such is arguably an "express or implied threat to use force or violence" (§ 190.3), it was not directed at a particular victim or victims, and did not amount to criminal conduct in violation of a penal statute. (*People* v. *Phillips, supra*, 41 Cal.3d at p. 72.) The Attorney General concedes as much.

We find the error nonprejudicial. This case was tried before *Phillips, supra,* 41 Cal.3d 29, and *Balderas, supra*, 41 Cal.3d 144, were decided. The jury was instructed on the requirement that "other crimes" be proved beyond a reasonable doubt. (*People* v. *Robertson, supra*, 33 Cal.3d at p. 55.) The properly admitted aggravating evidence in this case — in particular, the circumstances of the crime (§ 190.3, factor (a)) — was simply overwhelming. It would require capricious speculation for us to conclude that the erroneous admission of evidence of the "gun slapping" incident affected the penalty verdict.

Lastly, defendant argues that evidence of his 1979 felony conviction upon a plea of "no contest" to being an accessory to voluntary manslaughter should have been excluded. He asserts that such a plea "demonstrates only that a defendant is willing to accept the punishment prescribed for a particular offense," and "does not establish the truth of the facts implied or contained in the charge." The claim is specious. Section 1016 provides, in pertinent part, that: "The legal effect of [a nolo contendere] plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes." Moreover, defendant *stipulated* to introduction of this evidence. Evidence of the prior felony conviction was properly admitted. (§ 190.3, factor (c).)

9. *Juror Misconduct*

During a break in the penalty phase, defense counsel advised the court that he had observed a juror, Mr. Meyers, talking to Mr. McConnell, a member of the victim's family. Counsel had also seen one of the four alternate jurors, Ms. Romans, conversing with the victim's grandmother. A hearing was conducted in chambers on the matter. Juror Meyers explained that he was "discussing motorcycles" with Mr. McConnell. The conversation was "purely social;" nothing had been said about defendant or the trial proceedings. Defense counsel asked Meyers: "[D]o you think there is anything about the fact that you have had a chance to be exposed to Mr. McConnell in this social vein or whatever you would have some rapport or feeling with him that would prejudice or be a concern to me or Mr. Belmontes?" Meyers responded, "No." He expressed a clear understanding of the court's concerns. When asked, "Supposing you were to make a decision he [Mr. McConnell] didn't agree with, mainly life in prison, do you feel you could look him in the eye?" Meyers responded, "Sure." He then apologized for causing a problem.

Alternate Juror Romans was similarly questioned. She revealed she had talked briefly with the victim's grandmother, who was hard of hearing, on a "personal" level; "just wondering how she was, you know, holding up or something like that." Since Romans ultimately never sat on defendant's jury, there is no concern that her contact was prejudicial.

The prosecutor informed the court that he had instructed the members of the victim's family "not to talk to the prospective jurors, although that was some time ago." He advised the court that he would do so again. The court denied counsel's motion for a mistrial, stating on the record that having made the relevant inquiries it found "no taint." Back in the full jury's presence, the court admonished the jurors not to talk to any members of the victim's family, adding: "And I would admonish the McConnell family and the Steacy family also, please, whether you want you to talk about the stars or the tulips or the roses, I don't even want

to do that."

Defendant argues that a mistrial should have been granted — or in the alternative — Juror Meyers replaced with an alternate juror other than Ms. Romans. We have held that jury misconduct raises a presumption of prejudice; unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial. (*People* v. *Pierce* (1979) 24 Cal.3d 199, 207 [155 Cal.Rptr. 657, 595 P.2d 91]; *People* v. *Honeycutt* (1977) 20 Cal.3d 150, 156 [141 Cal.Rptr. 698, 570 P.2d 1050].) Our review of the record satisfies us that the presumption was rebutted and no prejudice actually resulted.

10. *Admissibility of Codefendants' Plea Dispositions as Mitigating Evidence*

Defendant argues that the trial court erred in excluding evidence of the pleas and negotiated dispositions of his accomplices at the penalty phase.[22] We disagree. Evidence of Bolanos's and Vasquez's negotiated plea dispositions — *separate and apart from evidence of their complicity and degree of involvement in the instant offenses* — bore no relevance to the jury's properly guided function at the penalty phase. "'[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of *the character and record of the individual offender* and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death (italics added).'" (*Lockett* v. *Ohio, supra*, 438 U.S. at p. 604 [57 L.Ed.2d at p. 989.], quoting *Woodson, supra*, 428 U.S. 280.)

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22. The jury of course learned at the guilt phase — for purposes of impeachment of Bolanos — that he had pled guilty to second degree burglary and was granted immunity from prosecution for McConnell's murder in exchange for his testimony at defendant's trial. Evidence of Vasquez's guilty plea to second degree murder was not admitted at the guilt phase. (*Ante*, fn. 9, at p. 779.)

The United States Supreme Court in *Lockett* stated: "We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. *The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.* A variety of flexible techniques — probation, parole, work furloughs, to name a few — and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence [fn. omitted, italics added]." (*Lockett* v. *Ohio, supra*, 438 U.S. at pp. 604-605 [57 L.Ed.2d at p. 990], italics added; see *People* v. *Allen, supra*, 42 Cal.3d at pp. 1286-1287.)

In *Coulter* v. *State* (Ala.Crim.App.1982) 438 So.2d 336, 345-346, the Alabama Court of Criminal Appeals, "[a]pplying the principles of *Lockett*, in light of *Eddings* [*Eddings* v. *Oklahoma* (1982) 455 U.S. 104 [71 L.Ed.2d 1, 102 S.Ct. 869]] and *Enmund* [*Enmund* v. *Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368]] ...," reasoned that "an alleged accomplice's sentence is a product of the aggravating and mitigating circumstances applicable to the alleged accomplice. *In the sentencing phase of the trial, the fact that an alleged accomplice did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be as an aggravating circumstance against him. Simply put, an alleged accomplice's sentence has no bearing on the defendant's character or record and it is not a circumstance of the offense*

(italics added)." (See also *Brogie* v. *State* (Okla. Crim. 1985) 695 P.2d 538, 546-547 [relying on *Coulter*].)

In *State* v. *Williams* (1982) 305 N.C. 656 [292 S.E.2d 243], certiorari denied 459 U.S. 1056 [74 L.Ed.2d 622, 103 S.Ct. 474],

defendant argued that the trial court had erred in refusing to submit to the jury as a circumstance in mitigation evidence that his two accomplices had negotiated plea bargains with maximum ten-year prison terms. In rejecting the contention, the North Carolina Supreme Court wrote: "The fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. [Citation.] The accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense. (See *Lockett* v. *Ohio* [, *supra*,] 438 U.S. 586.) It bears no relevance to these factors, and thus there was no error in the judge's refusal to submit it to the jury." (*Id.*, at pp. 261-262.)

The Fifth Circuit Court of Appeals has likewise rejected the identical contention, concluding that nothing in the United States Supreme Court's recent decision in *Skipper* v. *South Carolina* (1986) 476 U.S. 1 [90 L.Ed.2d 1, 106 S.Ct. 1669], or *Hitchcock* v. *Dugger* (1987) 481 U.S. 393 [95 L.Ed.2d 347, 107 S.Ct. 1821], lends any support to the argument that a codefendant's sentence disposition is relevant to a capital defendant's character, record, or the circumstances of his offense, as relevancy is defined in *Lockett, supra*, 438 U.S. 586. (*Brodgon* v. *Butler* (5th Cir. 1987) 824 F.2d 338, 343; *Brogdon* v. *Blackburn* (5th Cir. 1986) 790 F.2d 1164, 1169.)

Although we recognize that several Florida decisions have reached a contrary conclusion (see, e.g., *Brookings* v. *State* (Fla. 1986) 495 So.2d 135, 143; *Messer* v. *State* (Fla. 1976) 330 So.2d 137, 141-142), we find the rationale of *Coulter* v. *State, supra*, 438 So.2d 336, *State* v. *Williams supra*, 292 S.E.2d 243, and the

Brogdon decisions persuasive and conclude that their holdings should be applied here. At the guilt phase, defendant's jury was fully apprised of the roles and degree of participation Bolanos and Vasquez each had in the burglary and murder. The jury's verdicts and special findings, supported by the weight of evidence, establish that defendant was found beyond a reasonable doubt to have personally, intentionally killed McConnell prior to Vasquez's entry into the victim's house. Bolanos never entered the house. As a factual matter, defendant's accomplices clearly did not share his level of involvement and participation in the murder. On these facts, the holdings of *Woodson, supra*, 428 U.S. 280, *Lockett, supra*, 438 U.S. 586, *Eddings, supra*, 455 U.S. 104, and *Enmund, supra*, 458 U.S. 782 compel the conclusion that Bolanos's and Vasquez's individually negotiated dispositions were not "constitutionally relevant" to defendant's penalty determination. (See *People* v. *Allen, supra*, 42 Cal.3d at p. 1287; *People* v. *Brown, supra*, 40 Cal.3d at p. 540.)

11. *Juror Inquiries During Penalty Phase Deliberations*

After less than three hours of deliberation, the jury foreman presented the court with a note inquiring (1) "what happens if we can't agree?" (2) "can the majority rule on life imprisonment?" and (3) "how long do we deliberate today and what happens if we don't reach a decision by then?" The court responded by rereading CALJIC No. 8.84.2 — as modified at defense counsel's request — which in essence told the jury they had to choose between life imprisonment without parole and death, and that any verdict had to be unanimous. The concluding sentence of the modified instruction read: "In order to make a determination as to penalty, all twelve jurors must agree, *if you can*."

At this point a juror asked: "If we can't, Judge, what happens?" The trial judge replied that he knew what would happen but could not elaborate upon it. Defense counsel requested the court to inquire of the jury whether it would be able to reach a verdict, and the inquiry was posited. One juror responded: "Not the way

it is going." The foreman replied: "That is tough, yes." The court then asked the foreman: "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" The foreman replied: "I believe there is a possibility." Another juror added: "We did need more time." Finally, a different juror asked: "[W]ould this be an either/or situation? ..." — to which the court replied: "It is not that. ... If you can make that either/or decision. If you cannot, then I will discharge you."

Under the 1977 death penalty legislation (former § 190.4 subd. (b)), if a jury was unable to agree on penalty the court would impose a sentence of life without parole. Under the current death penalty law applicable here, if the jury is unable to agree on penalty the court must impanel a new jury; if the second jury becomes deadlocked, the court in its discretion may impanel a third jury or impose a sentence of life imprisonment without parole. (§ 190.4, subd. (b).)[23/]

Defendant argues that the trial court's failure to "forthrightly" answer the juror's inquiry was error. He contends that the only "forthright" reply would have been an instruction in the full-blown language of section 190.4, subdivision (b); i.e., informing the jury of the statutorily mandated procedures and possibility of subsequent retrials in the event of a deadlock.

We conclude that such an instruction under the 1978 death penalty law would have the potential for unduly confusing and misguiding the jury in their proper role and function in the penalty determination process. Penalty phase juries are presently instructed that their proper task is to decide between a sentence of death and life without the possibility of parole. Any further instruction along the lines suggested herein could well serve to lessen or diminish that obligation in the jurors' eyes. (See *People*

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23. Of course the People may elect to forego a second or third penalty phase retrial and assent to imposition of a sentence of life imprisonment without the possibility of parole.

v. *Kimble* (1988) 44 Cal.3d 480, 511-516 [244 Cal.Rptr. 148, 749 P.2d 803] [1977 death penalty law]; cf. *People* v. *Gainer* (1977) 19 Cal.3d 835, 852 [139 Cal.Rptr. 861, 566 P.2d 997, 97 A.L.R.3d 73] [wherein we held erroneous any instruction which states or implies that a jury's failure to reach a verdict will necessarily require retrial].)[24/]

In any case, the trial judge here responded to the jurors' questions in a commendably forthright fashion. When initially faced with the inquiries, he sought to avoid any confusion or unseen prejudice by rereading the pertinent CALJIC instruction. But thereafter, when one juror asked the very pointed question: "Is it either/or?" [i.e., automatic imposition of one or the other penalty in the event of a deadlock] — the court prudently avoided misinforming and misleading the jury by stating: "If you can make that either/or decision. If you cannot, then I will discharge you." Defendant can claim no prejudice from such a limited disclosure. It bore no resemblance to the often criticized "*Allen*-type instruction" designed to extract a verdict from a deadlocked jury by admonishing the minority jurors to rethink their positions in light of the majority's views. (*Allen* v. *United States* (1896) 164 U.S. 492, 501 [41 L.Ed. 528, 530-531, 17 S.Ct. 154].)

The jurors deliberated an additional one and a half days after receiving reinstruction and the court's responses to their inquiries before reaching their penalty verdict. There was no objection to the rereading of CALJIC No. 8.84.2, nor did trial counsel propose or request any further instructions. No further instructions were required; no prejudice from the court's replies to the jurors' inquiries is shown.

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24. Defendant speculates that without such instruction, a juror may believe that deadlock at the penalty phase will nullify the guilty verdicts returned in the guilt phase. However, in light of the instructions which explain the bifurcated nature of capital trials and the jury's function at the penalty phase, the possibility of such a mistaken inference being drawn is unlikely.

12. *Automatic Motion for Modification of the Death Verdict*

In every case in which a death penalty is returned, the judge must "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances ... and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reason for his findings." (§ 190.4, subd. (e).)

Defendant urges three grounds of error in the court's ruling on the automatic motion for modification of sentence. First, he contends that the content of a letter which the trial judge sent to the jurors — after they were discharged but prior to the hearing on the motion — reveals that the court had prejudged the merits of the motion, and could not thereafter render a fair and impartial decision. Second, he argues that the court's "verbatim" adoption of the proposed findings of fact and conclusions of law prepared by the prosecutor reflects a failure to exercise independent judgment in ruling on the motion. Finally, he contends the court improperly found lack of remorse as an aggravating factor in its findings on the motion.

a. The Letter

Several days after the jury returned its penalty verdict and was discharged, the trial judge sent the 12 jurors and 4 alternates a letter in which he praised the manner in which they had approached their task and obligations. He indicated his feeling that they were "a credit to the criminal justice system," and explained: "It was extremely difficult for me to express these thoughts to you upon your discharge. It was an emotional moment; we had spent many hours together and I now feel I must express my gratitude to you." He added: "*Your decision is acceptable and shall be followed* (italics added)." It is this passage which, defendant urges, reveals that the court had prejudged the merits of the automatic motion for modification of

his death sentence.

At the hearing on the motion, defense counsel expressed concern "that what was said in that letter would indicate in any way that the Court had made a decision prior to fully reviewing and hearing everything that was going to be said." The court responded: "Thank you. The statement, [']your decision is acceptable and shall be followed,['] is not indicative of the Court having made up its mind nor is it a statement that would forebear any statements, evidence, testimony that would be offered on behalf of Mr. Belmontes. [¶] *I think the statement was made for therapeutic purpose more than a legal purpose* (italics added)." Counsel did not request the trial judge to recuse himself from hearing the motion. At the conclusion of the hearing the court reaffirmed that it had made an "independent finding" in affirming the jury's verdict of death.

Subsequent to a jury's discharge, it is not improper to thank or praise the jurors for having dutifully served on the jury and conscientiously performed their functions. In a long and complex capital trial such as this was, it is understandable that the court might want to express gratitude to the jurors along these lines. The trial judge's communication to the jurors by letter here was plainly intended to convey such sentiment.

However, at the time the court sent the letter, it had not yet fully performed its own functions and obligations under the mandate of section 190.4, subdivision (e). Judgment and sentence had yet to be imposed. The court's remark in the letter: "Your decision is acceptable and shall be followed," was patently improper. The court must refrain from making any comment indicating that it cannot, or will not, perform its remaining obligations fairly and impartially under the law. Since the jury had performed its functions and properly been discharged, our concern here is not with the fact that the communication was made to the jurors, but with whether the remark establishes an inference that the court *in fact* had prejudged the merits of the motion, and therefore could not fairly and impartially perform its

statutory obligations in ruling thereon.

"It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) "'[I]n the absence of any contrary evidence, we are entitled to presume that the trial court ... properly followed established law.' [Citation]." (*Ross* v. *Superior Court* (1977) 19 Cal.3d 899, 913 [141 Cal.Rptr. 133, 569 P.2d 727].) Considering the improper remark in the context of the letter in which it was made, together with the court's credible explanation that it "was made for therapeutic purpose more than a legal purpose," we conclude defendant has not established that the trial judge ultimately failed to make the "independent determination" respecting the appropriateness of the penalty verdict, as he was obliged to do under section 190.4, subdivision (e). The court's thorough and detailed findings entered in the record reinforce our conclusion.

b. The Findings

Prior to the hearing on the automatic motion, the prosecutor requested permission to submit proposed findings of fact and conclusions of law in opposition to modification of the death sentence. Defense counsel stated: "I have no problem with it," but requested that he too be permitted to do the same. The prosecutor thereafter filed lengthy and detailed proposed findings of facts and conclusions of law. Defense counsel elected to file points and authorities in support of automatic modification of the death sentence. We find nothing improper in affording both defendant and the People the opportunity to file respective supporting and opposition memoranda in connection with the proceeding. Thoughtfully prepared documents of this type are of great assistance to a trial judge.

It is clear from the record that the court relied extensively on the prosecutor's proposed written findings, incorporating whole portions of them almost verbatim into its own findings in the record. The record likewise reflects that the court did not "rubber stamp" the prosecutor's proposed findings of fact, refusing to

subscribe to many of his overly conclusory proposals.

For example, the prosecutor proposed that the court adopt the following findings: "The defendant, while waiting in the victim's home and while talking to her, considered the alternatives available and decided to go through with the burglary, even though the victim was at home. By disabling the victim, he reasoned, the burglary could be completed unimpeded and by killing her, he decided, he would avoid identification as the perpetrator. The defendant knew from his conversations with Vasquez and the victim, that only Vasquez would be suspected. He knew that no one had seen him arrive at the home. He also knew he could hide out in Stockton or Southern California. Therefore, he concluded, the death of Steacy McConnell would eliminate the only person who could link him to the crime, except for his partners in the criminal enterprise, whom he counted on to maintain silence." These proposed "findings of fact" were riddled with *conclusory* inferences of defendant's state of mind; the court quite properly rejected them.

The prosecutor proposed a finding that, upon alighting from the Chevy, Bolanos and Vasquez "were able to hear the beating taking place inside." Although such was a fair inference to be drawn from the evidence, the court took pains to more accurately paraphrase the trial testimony, finding: "As they were outside they were able to hear the sound of thumping taking place inside, according to Ballanos' [*sic*] testimony." The prosecutor also proposed that the court make a finding that after the crime, while in the car, "[defendant] then stated that he had killed her to silence a witness." The court more accurately found that: "He then stated he had to take out a witness."

Our review of the court's detailed findings in the record convinces us that it fulfilled its statutory obligation to independently review the jury's verdict of death.

c. Lack of Remorse

Defendant argues that the court improperly made a finding that his lack of remorse was an aggravating factor. The prosecutor proposed that the court find: "[T]he defendant expressed no remorse of even the slightest degree pretrial, in his guilt phase testimony, in his penalty phase testimony, nor during his closing remarks to the jury at the penalty phase." The court instead made a finding that: "The defendant did not express any remorse in the guilt phase of his testimony. In his penalty phase, however, he did indicate to some slight degree his concern for the victim." This finding was included in that portion of the overall findings discussing mitigating circumstances. For reasons already explained, we find that both the prosector, in his argument to the jury, and the trial court, in its own findings on the automatic motion for modification of sentence, did no more than suggest the inapplicability or insubstantial evidence of remorse as a *mitigating* factor. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 790.)

13. *Proportionality Review*

Defendant urges that we conduct "intercase" proportionality review — i.e., an examination of whether imposition of the death penalty in his case is disproportionate to the penalties imposed on other persons who have committed similar offenses. It is settled that the Eighth Amendment requires no such comparison. (*Pulley* v. *Harris, supra*, 465 U.S. at pp. 51-54 [79 L.Ed.2d at pp. 41-43].)

Defendant urges that principles of *equal protection* require that he — as a capitally sentenced defendant — be afforded comparative sentence review equivalent to that provided for determinately sentenced felons under the "disparate sentence" statute. (§ 1170, subd. (f).) We have recently rejected the identical argument in *People* v. *Allen, supra*, 42 Cal.3d at pages 1286-1287.

Defendant argues that state and federal proscriptions against "cruel and unusual punishment" require that we conduct

"intracase" proportionality review — i.e., an examination of whether defendant's death sentence is proportionate to his individual culpability, irrespective of the punishment imposed on others. (E.g., *People* ~~v. *Dillon* (1983) 34 Cal~~.3d 441, 477-482 [194 Cal.Rptr. 390, 668 P.2d 697]; *People* v. *Lynch* (1972) 8 Cal.3d 410, 423-424 [105 Cal.Rptr. 217, 503 P.2d 921].)

Defendant was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality. He bludgeoned McConnell to death with an iron dumbbell bar; the force of the 15 to 20 some-odd blows leaving her with gaping wounds and a cracked skull. Her defensive wounds plainly evidenced a desperate struggle for life at defendant's hands. The murder occurred in the course of a calculated plan to burglarize the victim's home, to which defendant had gained entry on false pretenses. After the murder, defendant and his accomplices callously fenced the victim's stereo components for $100 — purchasing beer with a portion of the proceeds.

In the penalty phase the jury was fully apprised of all the factors properly bearing upon whether defendant was eligible for, and deserved, the death penalty. There was, of course, defendant's relative youth, evidence that he had a difficult childhood, and evidence that prior to the murder he had to some degree embraced religion and impressed others with his sincerity in this regard. However, "nothing in prior decisions of this court, or of the federal courts, suggests that his punishment is constitutionally disproportionate to 'the offense' or 'the offender.'" (*People* v. *Melton, supra*, 44 Cal.3d at p. 771.)

III. CONCLUSION

We find no prejudicial error, whether viewed singly or cumulatively, at either the guilt or penalty phases of defendant's trial.

The judgment is affirmed.

Opposition Brief Unavailable for Filming at this Time

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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS GOUGHNOUR, *Petitioner-Appellant,*

v.

FERNANDO BELMONTES, *Respondent-Appellee.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THOMAS GOUGHNOUR, *Petitioner-Appellant,*

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FERNANDO BELMONTES, *Respondent-Appellee.*

THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE v. CALIFORNIA*, 494 U.S. 370 (1990)

In Belmontes' opposition to the certiorari petition, he conspicuously sidesteps any discussion of the Ninth Circuit's misapplication of *Boyde*. He attempts to recast the circuit court's holding in terms of a fact-specific inquiry. In this regard, Belmontes seeks to minimize the circuit court's controlling emphasis on California's "unadorned factor (k)" instruction. At the same time, Belmontes avoids the *Boyde* issue by shifting the focus to the circuit court's subsidiary discussion of the trial court's allegedly improper responses to Juror Hern's questions during deliberations.[1/]

1. As discussed in the opening petition for writ of certiorari, this complaint about the judge's responses to Juror Hern's questions was the sole basis of any claim of instructional error raised in the Ninth Circuit and, for the matter, was the only claim of penalty-phase instructional error raised in Belmontes' many years of federal habeas litigation. However, it was not decisive or necessary to the Ninth Circuit holding of instructional error.

Belmontes' argument fails because, under any rational reading, the Ninth Circuit's holding of instructional error turns on the "unadorned factor (k)," instruction's purported failure to instruct jurors to consider "forward-looking" evidence of a defendant's future prospects in prison. App. 53a-60a. The distracting discussion about the mid-deliberation colloquy with Juror Hern merely supplements the circuit court's holding regarding the "unadorned factor (k)." The Ninth Circuit even concluded that the trial court's answers to Juror Hern served *only* to "[c]ompound[ ] the problems with the original and supplemental instruction. . . ." App. 61a-631.

As discussed in the petition for writ of certiorari, however, there simply was no "problem" to compound. As was true in *Boyde*, the jurors in this case would have reasonably understood the "unadorned factor (k)" instruction as permitting consideration of all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383. They certainly would have realized they could consider evidence of Belmontes' character for good future behavior in prison as being an "inevitable" element of their sentencing determination. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986). Indeed, the "unadorned factor (k)" instruction provided more than constitutionally-adequate guidance about the "forward-looking perspective of future dangerousness" which—consistent with *Boyde* and *Skipper*—"is not independent of an assessment of personal culpability." *Johnson v. Texas*, 509 U.S. 350, 369-370 (1993).

In any event, Belmontes' protestations about the mid-deliberation colloquy with Juror Hern are unavailing. During this informal conference with the jurors, the court directed them to "go over the instructions again with one another." The trial court's directive to review the previous instructions would have cured any possible confusion. *See Weeks v. Angelone*, 528 U.S. 225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves).

The previous instructions given in this case included the "unadorned factor (k)," which, as in *Boyde*, unambiguously informed the jurors that (1) they were to "consider all of the evidence which has been received during any part of the trial" and (2) they were to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Additionally, the previous instructions included the following "special instruction":

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

The trial court never said anything to indicate the jurors were limited or in any way restricted from using any mitigating evidence in any way they saw fit. To the contrary, the jurors were expressly told their consideration of any possible mitigating factors was unlimited. There is virtually no chance, let alone a reasonable likelihood, that the jurors misunderstood any of the court's instructions to prevent the consideration of any constitutionally relevant evidence. *Boyde*, at 380. As discussed in the petition for certiorari, the Ninth Circuit's finding to the contrary rests on an illusory distinction of *Boyde* and on an unreasonable review of the record. This Court's supervisory intervention is necessary to correct the Ninth Circuit's errant legal judgment in this case and to ensure that such a faulty interpretation of federal constitutional law will not

extend to future cases.

THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE v. LANE*, 489 U.S. 288 (1989)

Belmontes also insists the Ninth Circuit's opinion does not rest on a new rule but, instead, was somehow "compelled" by precedent predating the finality of his judgment.[2/] As discussed, however, the circuit court's opinion clearly turns on the sufficiency of the "unadorned factor (k)," and there is simply no preexisting authority to question the constitutionality of that instruction, or for that matter, any similar instruction. There certainly was no precedent at the time Belmontes' judgment became final which would have dictated the conclusion reached by the Ninth Circuit in this case. *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288.

Indeed, Petitioner believes the present *Teague* inquiry is particularly germane in light of this Court's recent grant of certiorari in *Goughnour v. Payton*, ___ S. Ct. ___ 2004 WL 3488 (May 24, 2004) (No. 03-10-30). In *Payton*, the Ninth Circuit found that the California Supreme Court had misapplied this Court's controlling precedent in rejecting a claim that the "unadorned factor (k)" instruction was insufficient to inform jurors they could consider evidence of the defendant's post-

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2. In support of this proposition, Belmontes cites *Eddings v. Oklahoma*, 455 U.S. 104, 112-117 (1982) and *Lockett v. Ohio*, 438 U.S. 586-606-609 (1978), which both stand for the simple proposition that a state may not affirmatively *prevent* a jury from considering relevant evidence in mitigation. Belmontes also cites *Penry v. Lynaugh*, 492 U.S. 302 (1989), which is equally unavailing and, in any event, is irrelevant for *Teague* purposes because it was decided after Belmontes' judgment became final. *See Belmontes v. California*, 488 U.S. 1034 (1989). In light of *Boyde, Eddings* and *Lockett* are simply too general a line of authority for Belmontes to rely upon. *Cf. Sawyer v. Smith*, 497 U.S. 227 (1990).

crime religious conversion and good behavior in prison. *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003). On May 24, 2004, this Court granted certiorari on the question of whether the circuit court's finding violated the AEDPA. *See* 28 U.S.C. § 2254(d).

Although the present case is not governed by the AEDPA, Petitioner believes the present *Teague* issue has direct bearing on the issue presented in *Payton*. In both *Belmontes* and *Payton*, the Ninth Circuit has interpreted the "unadorned factor (k)" instruction as being insufficient to inform jurors they could consider "forward-looking" evidence of future prison adjustment. In this respect, the question of whether such an interpretation "was contrary to, or involved an unreasonable application of," this Court's clearly established precedent (28 U.S.C. § 2254(d)) is closely related to the question of whether such an interpretation was dictated by precedent before the finality of Belmontes' judgment. *Teague*, at 301. For this reason as well, Petitioner submits a writ of certiorari should issue in this case.

CONCLUSION

For all of the aforementioned reasons, Petitioner respectfully requests that the petition for writ of certiorari be granted.

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Respectfully submitted,

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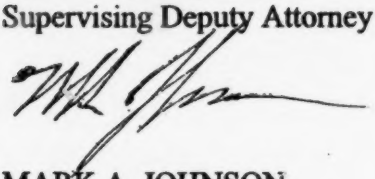

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